TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible]178

JOHN MILLER, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 25, 1912.

(23,034)

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SUPREME COURT OF THE UNITED STATES.

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No. 533.

JOHN MILLER, APPELLANT,

vs.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 22, 1912.

1 In the United States Court of Claims.

Number 30790.

JOHN MILLER
vs.
THE UNITED STATES.

Petition.

Filed Jan. 4, 1911.

To the Chief Justice and Judges of the Court of Claims:

Your petitioner represents as follows:

1. Petitioner is a resident of the Territory of Alaska and is a citizen of the United States.

2. September 15, 1905, the United States advertised for proposals to carry the mails, as follows:

"78108 from Valdez, By Tonsina, Copper Center, Gulkana (n. o.), Gakona (n. o.), Christochina (n. o.), Mentasta (n. o.), Tanana Crossing (n. o.), Ketchumstock (n. o.), Chicken, Franklin, and Jackwade, to Eagle 128 miles and back, once a week, from November 1 to April 30, and twice a month from May 1 to October 31 in each year, in close connection at Valdez, with steamers to and from Seattle, Wash. Any class of mail to be carried that the Department may elect, but the total weight not to exceed 600 pounds a single trip each way.

2 November 1 to April 30.

Leave Valdez Monday of every week;
Arrive at Eagle in 14 days;
Leave Eagle Wednesday of every week;
Arrive at Valdez in 14 days.

May 1 to October 31.

Leave Valdez twice a month, about the 1st and 15th of each month;
Arrive at Eagle in 14 days;
Leave Eagle twice a month, about the 15th and 30th of each month;
Arrive at Valdez in 14 days.
Bond required with bid, $60,000."

Other material parts of that advertisement are as follows:

"The Postmaster-General may order an increase of service on a route by allowing therefor not to exceed a pro rata increase on the contract pay. He may change schedules of departures and arrivals in all cases, and particularly to make them conform to connections

with railroads, without increase of pay, provided the running time be not abridged. The Postmaster-General may also discontinue, change, or curtail the service in order to place on the route superior service, or whenever the public interest, in his judgment, shall require such discontinuance, change, or curtailment for any other cause, he allowing as full indemnity to contractor one month's extra pay on the amount of service dispensed with, and not to exceed pro rata compensation for the amount of service retained and continued; but the Postmaster-General reserves the right to rescind any acceptance of a proposal at any time before the signing on behalf of the United States of the formal contract, without the allowance of any indemnity to the accepted bidder."

3 3. John R. Crittenden submitted a proposal, under the above advertisement, for the carrying of the mails on the route above described for $46,000 per annum. The advertisement and proposal were prepared and published by the government, and Crittenden and petitioner had nothing to do with the preparation and publication thereof.

4. The proposal of Crittenden was accepted, and thereafter a written contract was signed and executed by all the parties, a copy of which, omitting the attestation clause and signatures, is as follows:

"This article of contract, Made the first day of February, nineteen hundred and six, between the United States of America (acting in this behalf by the Postmaster General) and John R. Crittenden, contractor, and John Miller, of Valdez, Alaska, and Charles H. Kraemer, of Valdez, Alaska, as his sureties:

Witnesseth, That whereas John R. Crittenden, has been accepted, according to law, as contractor for transporting the mail on Route No. 78108, from Valdez by Tonsina, Copper Center, Gulkana, (n. o.), Gakona (n. o.), Christochina (n. o.), Mentasta (n. o.) Tanana Crossing (n. o.), Ketchumstock (n. o.), Chicken, Franklin and Jackwade, Alaska, to Eagle, Alaska, and back, once a week from November 1 to April 30, and twice a month from May 1 to October 31 in each year, in close connection at Valdez with steamers to and from Seattle, Wash., any class of mail to be carried that the Department may elect, but the total weight not to exceed 600 pounds a single trip each way, at the rate of Forty six thousand dollars per annum, for and during the term beginning the first day of July, nineteen hundred and six, and ending June thirty, nineteen hundred and ten. Now, therefore, the said contractor and his-

4 sureties do, jointly and severally, undertake, covenant, and agree with the United States of America, and do bind themselves—

1st. To carry said mail with certainty, celerity, and security, using therefor such means as may be necessary to transport the whole of said mail, whatever may be its size, weight, or increase, during the term of this contract, and by the schedule of departures and arrivals stated in the advertisement under which this contract is made, and within the running time fixed therein; and so to carry until said schedule is altered by the authority of the Postmaster General of the United States, as hereinafter provided, and then to carry according

to such altered schedule: (Provided, That when more than ten minutes are taken for opening and closing the mails at any office, the additional time so taken is to be allowed in addition to the time fixed in said schedule); and in all cases to carry said mail in preference to passengers and freight, and to their entire exclusion if its weight, bulk, or safety shall so require; and to carry the mail, upon demand, by any conveyance which said contractor regularly runs, or is concerned in running, on the route, beyond the number of trips above specified, in the same manner and subject to the same regulations as are herein provided touching regular trips.

2d. To carry the mail in a safe and secure manner, if in a vessel, and to be similarly protected, free from wet or other injury, under a sufficient rubber, oilcloth, or canvas if carried on a horse, and in a boot or covered receptacle under the driver's seat if carried in a coach or other vehicle.

3d. To take the mail and every part thereof from, and deliver it and every part thereof at, each post office on the route, or that may hereafter be established on the route (or on any route that may hereafter be established, and to which this contract may be extended, as hereinafter provided), and into the post office at each end of the route, and into the post office, if one is there kept, at the place at which the carrier stops for the night; and if no post office is there kept, to lock it up in some secure place, at the risk of the contractor.

4th. To take any mail matter or private mail satchels that may be tendered outside of the usual mail bag from any post office now on the route, or that may hereafter be established on the route, and carry the same to, and deposit into the proper boxes, or hang the mail satchels on the proper mail cranes, now on or that may hereafter be placed on the line of the route for this purpose (or on any route that may hereafter be established and to which this contract may be extended as hereinafter provided), when requested so to do; also to collect the mail from the boxes (when a signal is displayed to indicate that a box contains mail to be taken) and to deposit the same in the next post office at which the carrier arrives, and to take the mail satchels when they are used, either with or without mail, from the mail cranes and carry them to the post office as contemplated by the terms of the advertisement pursuant to which this contract is made.

5th. To be accountable and answerable in damages for the person to whom the said contractor shall commit the care and transportation of the mail, and his careful and faithful performance of the obligations assumed herein, and those imposed by law; not to commit the care or transportation of the mail to any person under sixteen years of age, nor to any person who has not sufficient intelligence to properly handle and deposit the mail for boxes along the route; nor to any person not authorized by law to be concerned in contracts for carrying the mails; to discharge any carrier of said mail whenever required so to do by the Postmaster General; not to transmit, by themselves, or either of them, or either of their agents, or be concerned in transmitting, commercial intelligence more rapidly than

by mail; not to carry, otherwise than in the mail, letters, packets, or newspapers which should go by mail, or convey or transport any person engaged in carrying letters, packets, or newspapers
6 which should go by mail; to carry post-office blanks, mail locks and bags, and other postal supplies, and also the Post Office inspectors and other special agents of the Post Office Department on the exhibition of their credentials, if a coach or other suitable conveyance is used, without additional charge.

For which services, when performed, and evidence thereof shall have been filed with the Postmaster General, the said contractor is to be paid by the United States at the rate per annum hereinbefore named; payments to be made monthly, and as soon after the close of each month as accounts can be adjusted and settled; said pay to be subject, however, to be reduced or discontinued by the Postmaster General, as hereinafter stipulated, or to be suspended in case of delinquency.

It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, by allowing not to exceed a pro rata increase of compensation for any additional service thereby required; and, in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with, and not to exceed a pro rata compensation for the service retained; but no increase of compensation shall be allowed for a change of service not amounting to an increase, nor indemnity of month's extra pay for any change of service not involving a decrease of service.

It is hereby also stipulated and agreed by the said contractor and his surities that whenever, in the opinion of the Postmaster General, it shall become necessary to increase the speed upon which the mail is carried, the service shall be readvertised for the reduced running time required: Provided, that the contractor, with the consent of his sureties, shall, subject to all the conditions hereinbefore and hereinafter stipulated, have the option of continuing service upon the expedited running time without additional compensation therefor; and
7 in case the contractor, with the consent of his sureties, shall have signified his desire to continue the service upon the reduced running time, and an order shall have been made in pursuance thereof, he shall, if required by the Postmaster General, perform the expedited service, subject to all the conditions hereinbefore and hereinafter stipulated, until the termination of his contract in like manner as if such expedited service had been the original covenant.

It is hereby also stipulated and agreed by the said contractor and his sureties as aforesaid that he shall forfeit—

1st. The pay of a trip when it is not run, and in addition, if no sufficient excuse for the failure is furnished, an amount not more than three times the pay of the trips.

2nd. At least one-fourth of the pay of a trip when the running is

so far behind time as to fail to make connection with a depending mail.

3d. For violating any of the foregoing provisions touching the transmission of commercial intelligence more rapidly than by mail; or giving preference to passengers or freight over the mail or any portion thereof, or for leaving the same for their accommodation; or carrying, otherwise than in the mail, matter which should go by mail; or transporting persons engaged in so doing, with knowledge thereof, a penalty not to exceed a quarter's pay.

4th. For the loss of, or depredation upon, a mail pouch in the custody of a contractor, a penalty in a sum not to exceed one and one-fourth times the value of the contents lost thereby: Provided, that the loss is occasioned by the fault of the contractor or his agent.

5th. For violating any other provision of this contract touching the carriage of the mails, or the time and manner thereof, without a satisfactory explanation of the delinquency, in due time, to the Postmaster General, a penalty in his discretion. That these forfeitures may be increased into penalties of a higher amount, in the discretion of the Postmaster General, according to the nature
8 or frequency of the failure and the importance of the mail: Provided, that, except as herein otherwise specified, and except as provided by law, no penalty shall exceed three times the pay of a trip in each case.

And it is hereby further stipulated and agreed by the said contractor and his sureties that the Postmaster General may annul the contract or impose forfeitures in his discretion for repeated failures or for failure to perform service according to contract; for violating the postal laws or regulations; for disobeying the instructions of the Post Office Department; for refusing to discharge a carrier, or any other person having charge of the mail by the contractor's direction, when required by the Department; for subletting service without the consent of the Postmaster General, or assigning or transferring this contract; for combining to prevent others from bidding for the performance of postal service; for transmitting commercial intelligence or matter which should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; or for the failure of the contractor to give his personal supervision to the performance of the service, and to reside upon or contiguous to the route; that the Postmaster General may annul the contract, whenever the contractor shall become a postmaster, assistant Postmaster, or member of Congress, or otherwise legally incompetent to be concerned in such contract; and whenever, in the opinion of the Postmaster General, the service can not be safely continued, the revenues collected, or the laws maintained on the road or roads herein.

And it is hereby further stipulated and agreed by the said contractor and his sureties—

1st. That such annulment shall not impair the right to claim damages from said contractor and his sureties under this contract, but such damages may, for the purpose of set-off or counterclaim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise,

be assessed and liquidated by the Auditor for the Post Office Department.

9 2d. That, within the meaning of this contract, foreign mails in transit across the territory of the United States shall be deemed and taken to be mails of the United States.

3d. That this contract may, in the discretion of the Postmaster General, be continued in force beyond its express terms for a period not exceeding six months, until a new contract with the same or other contractors shall be made by the Postmaster General.

4th. That no member of or delegate to Congress shall be admitted any share or part of this contract or agreement, or to any benefit to arise therefrom.

5th. That this contract is further to be subject to all the conditions imposed by law, and by the several acts of Congress relating to post offices and post roads, and to the conditions stated in the pamphlet advertisement of September 15, 1905."

The form of contract was prepared and provided by the Government for signature, and Crittenden and petitioner had nothing to do with such preparation.

5. For many years the regulations adopted and enforced by the Post Office Department have authorized the Postmaster General to discontinue or curtail the service, in whole or in part, in order to secure a "better degree of service" or "superior service," or whenever the public interest, in his judgment, should require such discontinuance or curtailment for any other cause; he allowing, as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and pro rata compensation for the amount of service retained and continued. Prior to 1874, and afterwards, regulation 263 contained the following language:

10 The Postmaster-General may also discontinue or curtail the service, in whole or in part, in order to place on the route a greater degree of service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause; he allowing, as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and a pro-rata compensation for the amount of service retained and continued.

That regulation in substance, and almost in the same language stood until prior to 1893, but it was amended, as section 817, to read as follows:

The Postmaster General may discontinue or curtail the service on any route, in whole or in part, in order to place on the route superior service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause, he allowing as full indemnity to the contractor one month's extra pay on the amount of service dispensed with, and a pro-rata compensation for the amount of service retained and continued.

Subsequently to 1893 it was slightly amended, and it reads as follows:

SEC. 1277. The Postmaster-General may discontinue or curtail the service on any mail route, in whole or in part in order to place

on the route superior service, or whenever the public interest, in his judgment, shall require such discontinuance or curtailment for any other cause, he allowing as full indemnity to the contractor, one month's extra pay, on the amount of service dispensed with, and a pro rata compensation for the amount of service retained and continued.

11 The regulation, whatever its language or its number, was not drawn and promulgated with reference to the conditions existing in Alaska on Route No. 78108 during the period covered by the contract sued on, but it was drawn and promulgated with reference to conditions existing within the limits of the United States and exclusive of that route in Alaska, and particularly without reference to the hereafter described conditions existing in that part of Alaska covered by the contract sued on.

In the preparation of the forms of advertisement, proposal and contract in suit, the government officials adopted the regulation in force, and such advertisement, proposal and contract were drawn and printed for general use, and the proposal and contract were presented for execution, without particular regard to the physical, climatic, or other conditions then existing or that might exist along the line of that route during the contract period of four years. At the execution of the proposal and contract, and of the subsequent contract of subletting, Crittenden and petitioner did not think or believe that the contract in suit would be discontinued or terminated in any manner or form, but on the contrary, they believed that the contract in suit would be in full force and effect during the whole contract period, and they named the amount of annual compensation in that belief. They expected that they would encounter losses of profits in a portion of the contract period, but would earn good profits before the contract period ended and for the whole contract period. Had Crittenden and the petitioner believed otherwise than as above stated, they would not have executed either of the contracts for that annual compensation, nor would petitioner have made the arrangements and expenditures in the early part of *of* 1903,

12 hereinafter described. On the contrary, petitioner made such arrangements and expenditures in the belief that the contract would be in force for the full contract period. Petitioner avers that if the government had asked bids for a two year contract on that route Crittenden would not have submitted a bid at all, and petitioner would not have become surety on any contract for less than $92,000 per annum, because the conditions were such that the expenses of carrying the mails on the route would be far heavier for carrying them in 1906 than in 1907, and in 1907 than in 1908, and in 1908 than in 1909. As an illustration, the petitioner avers that it cost, to-wit: $151,169.55 to perform the contract until it was discontinued by order of the Postmaster General, that amount being to-wit: $48,595.08 more than the total sum received from the government, but it would only have cost him, to wit: $43,390 to perform the contract for the remaining twenty-two months of the contract period, during which time he would have received, to-wit: $84,326.00 for carrying the mails, a profit of, to wit: $40,936.

6. It soon developed that Crittenden was not able to command the capital needed in the performance of the contract, and therefore petitioner was obliged to and did expend the money needed to buy harness, sleds, horse-feed, horses and dogs to carry the mails, and by July 1, 1906, the contractor, and petitioner, as his surety, were ready to begin performance of the contract, and the contract was performed to the satisfaction of the government until the service was arbitrarily, capriciously, and erroneously discontinued by the Postmaster General, notwithstanding the conditions that existed during all the period covered by the contract, as hereinafter set forth.

13 7. Afterwards, petitioner and the said Crittenden entered into a contract of subletting, the material parts of which, omitting signatures, are as follows:

"This article of contract, made the 1st day of May, nineteen hundred and eight, between John R. Crittenden, of Valdez, Territory of Alaska, contractor with the United States, party (or parties) of the first part, and John Miller, of Valdez, Territory of Alaska, subcontractor, party (or parties) of the second part, and —— —— of ——, his sureties:

Witnesseth, that whereas the said party (or parties) of the first part has executed a contract with the United States (acting in this behalf by the Postmaster General), according to law, for transporting the mail on Route No. 78108, from Valdez, Territory of Alaska, to Eagle, Territory of Alaska, and back twice a month from May 1st to Oct. 31st in each year and one times a week from Nov. 1st to April 30th in each year from July 1st, 1906, to June 30, 1910, on the schedule prescribed by the Post Office Department, and having obtained conditional permission to sublet the same, has made the following agreement with the said party (or parties) of the second part, to wit:

That said party (or parties) of the second part, and his sureties aforesaid, do jointly and severally undertake, covenant, and agree, and do bind themselves and each of them to and with the said party (or parties) of the first part in the sum of — dollars, to transport the United States Mail on the said Route No. 78108, from Valdez, Territory of Alaska, by Copper Center, Gulkana (n. o.) Kokmo (n. o.), Chistochina (n. o.) Mentasta (n. o.), Tanana Crossing (n. o.), Ketchumstock (n. o.) Chicken, Franklin and Jackwade —— to Eagle, Territory of Alaska, and back (including the depositing and collecting of mail along the route, as provided by the advertisement) twice a month from May 1st to Oct. 31st in each

14 year and one times a week, from the 1st day of November, to April 30 in each year, from the 1st day of May, 1908, to the 30th day of June, 1910, inclusive, on such schedule as the Postmaster General may direct, and in full compliance with the postal laws and regulations, and subject to all the requirements of the said party of the first part under the said contract with the United States, for forty-six thousand dollars per annum, or for the annual rate of pay set opposite the number of round trips that may be ordered by the Postmaster General to be performed during the period of this subcontract, as follows:

One round trip per week — dollars per annum.
Two round trips per week — dollars per annum.
Three round trips per week — dollars per annum.
Six round trips per week — dollars per annum.
Seven round trips per week — dollars per annum.
Twelve round trips per week — dollars per annum.
Fifteen round trips per week — dollars per annum.
Eighteen round trips per week — dollars per annum.
Twenty-four round trips per week — dollars per annum.
— round trips per week — dollars per annum.

And it is hereby further agreed that liability for all fines and deductions imposed upon a party of the first part by the Postmaster General, for failures and delinquencies in the performance of service under his contract, shall be assumed and borne by the party of the second part, and, if necessary, the Auditor for the Post Office Department may enforce this agreement by proper deductions from any compensation due the party of the second part for service performed under this subcontract.

And it is hereby further agreed that for any additional service required by the Postmaster General, and not hereinbefore expressly stipulated, the party of the second part shall be allowed not to exceed a pro rata increase of compensation; and, in case of decrease, curtailment, or discontinuance of service, as full indemnity, a pro rata of the one month's extra pay allowed by the United States to the party of the first part, and, unless previously herein stipulated, not to exceed a pro rata compensation for the service retained.

And it is hereby further agreed that in case of failure or refusal by the party of the second part to perform the mail service herein provided for, then the sum hereinbefore stipulated shall become immediately due to the party of the first part as liquidated damages and not as a penalty, and, in default of payment thereof, may be recovered in an action of debt.

To the faithful performance of each and every covenant, and agreement hereinbefore mentioned the parties do bind themselves, and each of them, and their heirs and personal representatives, and in testimony thereof do hereunto set their hands and seals, the day and year set opposite their respective names."

That contract of subletting was prepared and printed by the United States as a form long in general use, and petitioner and Crittenden had nothing to do with its preparation. It was executed by the parties to it, with the written consent of the Postmaster General, and a copy was filed with the Second Assistant Postmaster General who notified the Auditor for the Post Office Department of the fact of the filing in his office of such contract, all in conformity with the Act of May 17, 1878, sec. 2, 3, (20 Stat. 61, 62) and sec. 1300 of the Regulations of the Post Office Department, edition of 1902. At the time this contract was executed petitioner believed that it and the original contract would be in full force the entire period covered by the latter, and he executed that subcontract in that belief.

8. When it developed that Crittenden was not able to com-
16 mand the capital needed in the performance of the contract,
as before stated, petitioner entered into a contract with Crittenden by which he agreed to and did advance Fifteen thousand dollars for the first year's supplies, and thereafter he entered into a copartnership relation with Crittenden, in order that petitioner might be protected and the contract with the government be duly performed. That relation existed until it was dissolved, by mutual consent by an instrument in writing dated February 15, 1908, by which writing Crittenden agreed and contracted that petitioner should have and retain all moneys due or to become due from the United States on account of the mail contract dated February 1, 1906, hereinbefore set forth, but the relation of principal and surety did not cease to exist then or afterwards. By the Fall of 1905, petitioner had expended in the purchase of horses, harness, sleds, horsefeed, and dogs, more than Twenty thousand dollars before any payments were made by the United States, and during the life of the contract he furnished all the money needed and used in its performance.

9. The existing conditions in that region made it extremely difficult and hazardous to property, human life and limb, in performing the contract for the carrying of the mails on the route described and within the time specified. In many places there were no trails; horses and men could use the government trails but seldom because of their bad condition. Carriers had to push through timber and brush the best they could for many miles. Often the packs were pulled off the horses by timber and other obstacles, and the carriers would have to unpack the mails, get the horses up and pack the mails on them again. Men and horses had to walk 15 to 20
hours a day to make the regular runs. Gulkana, Kokana,
17 Chistochina, Indian Creek, Ahtell, Slana, Little Tokio
and Big Tokio Rivers were without bridges, and all were hard and dangerous to cross, both to animals and men, because of the difficult shores and the ice running in the rivers. The same trail could be used seldom two trips in succession. Because of the water which flooded the rivers, carriers would have to take to the timber and cut trails so as to avoid the water, for neither animals nor men could stand it to wade through those overflows when the thermometer was ranging from forty to sixty degrees below zero, thus increasing the mileage to be travelled in making the service. In other portions of the route the trails pass through thickly wooded and brushy country, where narrow pack trails had been cut which were almost impassable for sleds. The depth of the snow ranged from 6 inches to 24 inches at each snowfall, and when the new snow did not interfere with travel the wind would cause it to fill up the trails and make the latter more difficult than before. The Little Tokio River was hard to cross because it was fed by warm springs which caused the river to open up frequently. The river is very deep and, when covered with a heavy fall of snow, is exceedingly treacherous. The Big Tokio is a glacier stream, and it is constantly covered with water during the winter months, overflowing out into the timber for half

a mile on either side. Often the carriers had to go through that water. During the freeze-up in the Fall and the break-up in the Spring it was very difficult to carry the mail across the Big Tokio without losing it or getting it wet. Many trips the carriers would labor and travel from 18 to 20 hours in succession and only make 6
or 7 miles distance, owing to the snow or the water, or both.
18 Every effort was made to supply the men and beasts with food, but the physical conditions of the country and the climatic difficulties were such that the men and animals often suffered great hardships. At one time petitioner and six of his men, while in the Tickhel Valley, ran out of food and their necesities were such that they took and ate flesh from a horse that had been shot because it was freezing to death, and petitioner and his men ate that flesh for their Thanksgiving eve supper and Thanksgiving Day dinner. Petitioner's hand and feet were frozen at the time and they were 65 miles from camp. At another time petitioner went over the route in March and April, 1908, to supervise the work of carrying the mails. From Gulkana to Chistochina, 40 miles, his horse had to break a new trail and was 18 hours in doing so. Most of this was night work. From Chistochina to Boulder Creek the trail was snow-drifted for 31 miles. A deep snow was falling and it took 17 hours and 40 minutes to make the trip. Here he met other carriers and they left Boulder Creek at 3:30 A. M., March 22 taking the trail through to Tanana Crossing and using two dog teams. Petitioner drove one team of five dogs to Mantasta, 17 miles, in 10 hours. Then he went by horse to the Tokio Forks Cabin, arriving at 7:30 P. M., making 32 miles in 16 hours through loose snow. When crossing a little creek north of Mantasta the horse broke through the ice and its hind legs and back got wet. The water froze on the horse and petitioner had to take him into the men's cabin where he could thaw out and get dry by the heat of the stove. Petitioner left Tokio Forks Cabin, March 23, at 5 A. M. and reached Tanana Crossing at
11:30 P. M., making 39 miles in 18 hours. There was no rest
19 for man or horse. Mail that left Valdez March 9, was caught in the storm in Indian Pass and was delayed about two days. Mail Carrier Swanson was two days in getting 31 miles. He had to hire two men, and two mining men going into Chicken Creek, and they shoveled a trail through Indian Pass. They were still shoveling when petitioner found them March 21st. The trail was opened March 26, but the contractor was fined by the government because the mails were not delivered on time. Petitioner got back to Valdez April 22, having made the round trip between March 13 and April 22. This account of his journey from Valdez to Tanana Crossing and Eagle and back to Valdez is but an illustration of the difficulties that were encountered and the hard-hips that were endured in winter, but the other seasons of the year presented their difficulties and hardships too. On one occasion petitioner left Valdez with the mail for the first of June and helped take it through to Chistochina, he using horses and having the aid of carriers. He had to take the mail across Gulkana and Kokona Rivers in boats and the horses had to swim. Going from Kokona, they could not use the govern-

ment trail for 19 miles on account of its unfit condition, and they had to go up the side of the Copper River, cutting out a trail as they went. While ascending the Talsona River they learned from an Indian that the Talsona Bridge had been washed out and that they could not cross the stream without swimming the horses and getting the mail wet. They turned back to the mouth of the Talsona River and crossed there. They took an old trail that was cut in 1900, but it was so narrow and full of high stumps that they had to leave it and cut a way out to the government trail to the west. They were five hours late in arriving at Chistochina, where a change of
20 horses and men was ready, and petitioner started them at once, 1:00 A. M., in an effort to make up the lost time between that point and Tanana Crossing. At that crossing it was necessary to have two stations, one on either side of the Tanana, for it was dangerous to swim the horses and therefore the mail was taken across in a boat. It was necessary to use a boat on Little Tanana River about three miles North of the Tanana River for about three months in the Spring and Summer because it was very deep. All this unpacking and repacking took valuable time, and the government never failed to assess a fine if the mail did not arrive at the designated points at the times fixed. Such difficulties and hardships as these were encountered constantly each year. The foregoing facts and physical and climatic conditions were matters of common knowledge in that part of Alaska, and were known to the agents of the Post Office Department.

10. The expense of preparation for the service under the contract, and of maintaining the service thereunder, were very great. By July 1st, 1906, Crittenden and petitioner were ready to perform the contract and had their men, dogs, horses and food along the route and they entered on the performance of the contract promptly and well prepared. In the winter of 1906, they contracted with Scott & Frase to carry the mails from Tanana Crossing to Eagle, and the latter carried such mails until March 28, 1908. In the Spring of 1907, Crittenden and petitioner started with another year's outfit, and they put a large and complete one along the trail from Valdez to Mantasta, 215 miles, deep snow and storms making their work difficult and costly. They were then prepared to use horses all
21 the way between the points just named. In March and April, 1907, petitioner made a shipment of twenty tons of horse-feed from Fairbanks to Tanana Crossing, at 16½ cts. per pound or $330.00 per ton, that being the lowest freight charge obtainable. In the summer of 1907, they had to cut and grade horse and sled trails so as to make good time, and they had to shorten the trail in places as the running time was fourteen days, and at some points the existing trails were so soft and swampy that the men and pack horses had to make new trails every trip. They built bridges on several creeks as well as houses for the men, stables for the horses and cache houses for feed, so that the men and horses would be protected and sheltered at night as well as fed. North of Gulkana to Tanana Crossing, the government had never done any repairs to the trail, and it ran through such swampy country that it could not be

used for mail purposes. Crittenden and petitioner had to cut a trail and grade it in some places, and build bridges south from Christochina about 10 miles. From Chistochina Station north to Tanana Crossing they cut and graded trails, building bridges at some places, for about 105 miles. They built cabins and stables at Indian River for men and horses; and cabins, stables and cache houses at Boulder Creek, 31 miles north of Chistochina; Mantasta; Tokio Forks, 18 miles north of Mantasta; Clear Water, 17 miles north of Tokio Forks, and Tanana Crossing, on the south side. They had to put up all these houses at their own expense to protect men and stock, and it was known that one mail carrier was frozen to death, while carrying mail under a previous contract, because he did not
22 have sufficient shelter. Wherever it was necessary on the route, real estate was bought on which to put up buildings. The houses and cabins above named, were used by prospectors, the U. S. Signal Corps men, the natives, and the men who traveled in that country on the way to Athell and Nabesna mines and return. Crittenden and petitioner repaired the Talsona Bridge, in the Spring of 1907, it having been swept off its foundations and partly carried away, and horses and men could not cross the river without swimming, and in the Spring of 1908, the bridge was carried away completely. Petitioner built a bridge on the Talsona River, 17 miles south of Chistochina, so they could use it for the mails north and south bound. They improved a bridge that had been put in by the government, by raising its abutments four feet higher, anchoring it with wire, and putting it above the high waters of the spring season. That Bridge was used by everyone traveling north and south to the Chisna, Sleet Creek, and Middle Fork Mining district; and to Athell and Nabesna Mining camps, as well as by mail carriers from Gulkana to Dempsey's post office, and the Chisna mining district. The foregoing facts and conditions were matters of common knowledge in that part of Alaska, and were known to the agents of the Post Office Department. The trails, bridges, and nearly all the buildings mentioned, are on public lands, and since September 30, 1908, they have been used by the new mail contractors without compensation made to petitioner.

11. Petitioner put a large, necessary, and expensive outfit on the route for the year 1908, and the Winter and Spring of 1909, in the belief that the contract would be in force to the end of the contract period, and he took over the contract that had previously
23 been made with Scott & Frase for carrying the mails from Tanana Crossing to Eagle, in the same belief. That being done, he secured Five thousand dollars' worth of horse-feed and took it from Forty Mile Post, on the Yukon, to Steel Creek, Clarke and Franklin Gulches, and up to Chicken Creek, in the Forty Mile District, the freight costing him from 1 to 11½ cts. per pound, and took it from Chicken Creek by his own mail carriers to Taylor's Road House, Ketchumstock Station, Mitchell's, Lone Cabin Station, and from Steel Creek up to Liberty Creek Cabin, on O'Brien Creek. The first of April, 1908, petitioner put three good men in charge of the operations, paying

them good wages, two at Eagle and one at Tanana Crossing. These three men did the work that it had taken four or five men to do previously, because conditions were getting better. Petitioner had good men to do the work all along the 458 miles of route that had to be traversed, and he was able to cut down expenses greatly for the summer of 1908, and subsequently, and the business was going along nicely. About $1,000 worth of trail and bridge work between Tanana Crossing and Eagle had been done, to shorten the winter route and give good service. It was necessary to do all these things that the contract might be performed, as the government did not make allowance for delays whether caused by snows, storms, blizzards, the freeze-up in the Fall, the break-up in the Spring, or any other consideration, but fines were charged at every opportunity.

12. August 11, 1908, the Postmaster General decided, and petitioner was notified later, that the mail service on the route should be discontinued September 30, 1908, and that he would be allowed one month's pay. If he had been informed in February, 1908,
24 that the service would be discontinued, in whole or in part, he would not have gone to the expense of putting the one year's supplies on the trail between Valdez and Eagle. Most of the horse-feed between Chistochina and Ketchumstock was lost. It had taken two years to get the trail in good condition for carrying the mails, the amount of which in that time had increased largely, for the country was settling up with ranchmen, prospectors and mining men. If the government had let the contract run the entire four year term, petitioner could have made enough money out of the performance of the contract to have recouped about all the losses sustained and herein set forth. The service was discontinued at a time when the contract had a year and nine months to run, in which time petitioner would have earned $84,326 under the contract, and have made profits that would have reimbursed about all the losses previously sustained. In 1906 and 1907, the freight rates on supplies had cost petitioner heavily. For instance, the rates from Valdez to Chistochina were 22 cents per pound, and to Mantasta, 32 cents per pound. But in 1908 the freight rates had been reduced enormously, because the trails were improving, and the government was expending large sums of money in repairing the trail between Valdez and Gulkana, these improvements assuring good trails in the future and much lower freight charges. By the Spring of 1910, the freight rates had dropped off one-half from what they were three and four years before. As soon as the government road had been put in condition, the mail men used wagons between Valdez and Gulkana, and while it had taken six or seven horses to carry the mails by petitioner between the points named, two horses
25 hitched to a buckboard carried the same mails for the new contractors and made better time; fewer men were needed and the service cost much less than before. These conditions, and all other controllable conditions, would have been to the advantage of petitioner, and would have enabled him to recoup the loss that he had incurred up to September 30, 1908. The following is a profit

and loss statement for the period covering the actual life of the contract:

Disbursements on account of labor, feed, expenses on the route, including expenses of maintaining stations, etc.	$110,040.03
Disbursements on account of Scott & Frase, sub-contractors	41,129.52
Total disbursements	$151,169.55
Total receipts from the Post Office Department	$102,572.41
Total losses	$48,597.14

13. Route 78108 is from Valdez to Eagle, as before stated, and the distances are as follows: From Valdez to Tonsina is 80 miles; from Tonsina to Copper Center is 26 miles; from Copper Center to Gulkana is 28 miles; from that point to Gakona is 4 miles; from Gakona to the junction of Chistochina and Copper river is 39 miles; from that junction to Mentasta is 50 miles; from Mentasta to Tanana Crossing is 50 miles; from that crossing to Ketchumstock is 60 miles; from that point to Chicken is 30 miles; and from that point to Eagle is 99 miles, being 466 miles in all, as against 458 miles as paid for by the government.

After August 1, 1908, and during the contract period, the
26 following orders of, concerning, and touching the region covered by route 78108 were made and entered of record by the Postmaster General, viz:

Order B—15683, August 11, 1908, discontinued service upon route 78108, from Valdez to Eagle, effective September 30, 1908.

Order B—15685, August 11, 1908, extended service upon route 78110 from junction of the Chistochina and Copper rivers to Gakona, increasing the latter route 33 miles, and allowing the contractor for that route $1,386.00 per annum, for that extended service.

Order B—15686, August 11, 1908, to supply Tonsina, Copper Center, and Gakona, both ways, increasing the distance 7 miles and allowing the contractor $1,739.21 per annum.

Order B—17397, September 18, 1908, authorized emergency service between Eagle and Chicken, 99 miles and back, 3 round trips monthly, October 1 to December 31, each year, at $199.00 per round trip; and Order B—2818, of February 16, 1909, paid John B. Powers $1,791.00 for the 9 round trips of October 1, 10, 20; November 1, 10, 20, and December 1, 10, 20, 1908, so ordered as above and made by him, at $199.00 for each round trip.

Order B—21552, November 27, 1908, accepted proposal of John B. Powers, at $8,992.00 per annum, for service between Eagle and Chicken, 99 miles and back 3 times a month, 450 pounds a trip, from June 1 to September 30, and 200 pounds a trip from October 1 to May 1.

Order B—5370, March 27, 1909, authorized payment to James

Fish for service between Valdez and Gakona, 136 miles, from
27 June 1 to July 15, 1909, and from Valdez to Gulkana, 132 miles, July 16 to September 30, 1909, and June 1 to 30, 1910, at $250.00 a round trip, 3 round trips to be performed each month from June 1 to September 30, each year, summer service; and orders 21015, 21016, 21017, and 3289, paid him $3,000.00 for 12 round trips during June 1 to September 30, 1909, 4 months, at 3 round trips each month.

Order B—19563, October 5, 1909, discontinued supply of Gakona, decreasing distance 7 miles, and decreasing pay $1,739.31 per annum.

The mail service in the region covered by route 78108 was not discontinued except as to that part between Chicken and the junction of the Chistochina and Copper rivers, a distance of 190 miles, and in the remainder of the region covered by route 78108 mail service was continued from September 30, 1908, as is shown by the above named orders, fewer trips being made and less weights being carried, as stated. The orders named operated as a change of service only on route 78108, except as to the discontinuance of mail service between Chicken and the junction of the Chistochina and Copper rivers, as above stated. The Postmaster General did not ask petitioner to consent to any modification of the contract or to its discontinuance nor did the Postmaster General advertise that proposals would be received for changes in the terms of such contract, in accordance with section 3958, Rev. Stat. concerning changes in contracts. All the points named in those orders had been faithfully served under the terms of the contract in suit, and petitioner could and would have done and performed the contract at a profit to himself of Forty thousand nine hundred and thirty-six dollars, for the re-
28 mainder of the contract period; and the performance of the contract would have enabled him, also to avoid losing the property that was lost in 1908, and 1909, as hereinbefore stated, in the sum of Five thousand eight hundred dollars, for horse-feed alone, and Five thousand dollars for buildings, which losses could and would have been avoided through and by means of the performance of the contract. On the contrary, petitioner was excluded from the performance of such service by the Postmaster General, to his great loss and damage, as aforesaid, over his objections and protests, and against his wishes and desires.

This claim nor any part thereof has — been assigned to any person or corporation and the same is the sole property of this petitioner.

There is no set-off or counterclaim in favor of the government against the petitioner; no part of the demand sued on has been paid by the United States, and there is due to the petitioner the sum of, to-wit: $51,736.

Wherefore petitioner prays judgment against the United States for Fifty-one Thousand, Seven Hundred and Thirty-six Dollars.

DUDLEY & MICHENER,
Attorneys of Record.

LAFAYETTE PENCE,
PERRY G. MICHENER,
Counsel.

DISTRICT OF COLUMBIA, *ss:*

John Miller, of lawful age, being duly sworn, deposes and says that he is the petitioner in the above entitled case; that he has
29 read the petition and understands the same, and that the matters and things in the petition set forth are true in substance demurrer was submitted.

JOHN MILLER.

Subscribed and sworn to before me, this 3rd day of January, 1911.

[SEAL.] HERBERT L. FRANC,
Notary Public.

30 II. *Demurrer. Filed January* 25, 1911.

Demurrer.

Comes now the defendant by the Attorney General and demurs to the petition herein, on the ground that said petition does not state facts sufficient to constitute a cause of action against the defendant.

JOHN Q. THOMPSON,
Assistant Attorney General.
F. DE C. F.

CHAS. F. JONES,
Assistant Attorney.

31 III. *Argument and Submission of Demurrer.*

On the 23rd day of October, 1911 the demurrer in this case came on to be heard. Mr. Charles F. Jones was heard in support of the demurrer; Mr. Louis P. Michener was heard in opposition and the demurer was submitted.

32 IV. *Opinion of the Court. Filed Dec.* 4, 1911.

PEELLE, *Ch. J.*, delivered the opinion of the court:

The defendants demur to the petition on the ground that the facts averred are not sufficient in law to constitute a cause of action.

The substantial facts are these: Pursuant to the advertisement for proposals therefor John R. Crittenden became the contractor to transport the United States mails over route 78108 from Valdez, via the stations named in the contract, to Eagle, Alaska Territory, "428 miles and back once a week from November 1 to April 30 and twice a week from May 1 to October 31 in each year" for a period of 4 years from May 1, 1906, at and for the consideration of $46,000 per annum.

The contractor having given the required bond with the claimant

as one of his sureties entered upon the performance of the contract, and with the financial assistance of the claimant herein performed the service thereunder until May 1, 1908, when the contractor, after having obtained conditional permission therefor, sublet the contract to the claimant herein.

The contract so sublet to the claimant was as to service and compensation identical with the contract with said Crittenden and otherwise obligated the claimant to comply with the terms of said contract.

By the terms of the contract with the original contractor it was provided that "the Postmaster General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, he allowing not to exceed a pro rata increase of compensation for any additional service thereby required, and, in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with, and not to exceed a pro rata compensation for the service retained; but no increase of compensation shall be allowed for a change of service not amounting to an increase, nor indemnity of month's extra pay for any change of service not involving a decrease of service."

Section 1277 of the postal laws and regulations provides:

"The Postmaster General may discontinue or curtail the service on any mail route, in whole or in part, in order to place on the route superior service, or whenever the public interest, in his judg-
33 ment, shall require such discontinuance or curtailment for any other cause, he allowing as full indemnity to the contractor one month's extra pay on the account of service dispensed with, and a pro rata compensation for the amount of service retained and continued."

Prior to the claimant's contract he had, as averred, advanced money to the contractor with which to purchase the necessary equipment and supplies, and later entered into a partnership with him to protect himself in the performance of the contract, and so continued until a short time before the date of the contract in suit.

By reason of the unusual conditions existing in Alaska, i. e., on account of severe weather and the absence of highways over which to carry the mails the claimant, as averred, was compelled to transport along the route at great expense a sufficient outfit or supply of food both for man and beast for one year, and to construct bridges across streams and build cabins and stables, all with the expectation of the continuance of the contract for the period of four years from July 1, 1906; that the discontinuance of the service prior thereto, to wit, September 30, 1908, with only one month's pay, involved him in great loss in excess of the amount so paid, besides the loss of profits which, he avers, he might have made by reason of his preparation and expenditures for the performance of the residue of the service.

The claimant contends that the postal laws and regulations referred to do not apply to the transportation of mails in Alaska, al-

though the claimant, by the terms of his contract, obligated himself to comply therewith in the performance of the service.

The language of the contract with Crittenden (which contract the claimant obligated himself to carry out) is substantially the language of the postal laws and regulations, and, therefore, to sustain the contention of the claimant the court, in addition to holding that the postal laws and regulations do not apply, would have to eliminate similar provisions from the contract.

That the Postmaster General had the authority to discontinue the service in whole or in part, both by the terms of the contract and the postal laws and regulations incorporated therein, there can be no question; and as the language both of the contracts and the postal laws relating to the authority of the Postmaster General to discontinue the service is free from ambiguity no interpretation thereof is permissible.

The claimant's contention that in the interpretation of any particular clause of a contract the court should examine and consider the entire contract is well founded; and if the provisions of the contract respecting the authority of the Postmaster General to discontinue the service were susceptible of interpretation we should, in view of the evident hardships imposed in this case, resolve the doubt in favor of the claimant. However, the difficulties in the way of performance of the contract, the court must presume, were taken into consideration by the contractor when he made his bid for the service. The real hardship imposed upon him was in the discontinuance of the service and the payment of only one month's extra pay. This course left the claimant with his equipment, consisting of stock, dogs, and provisions, on hand, remotely scattered, and deprived him of the profits which he claims would have accrued to him had he been permitted to continue the service until the end of the contract period.

34 In the case of Slavens v. United States (196 U. S., 229, 233-236), affirming this court (38 C. Cls., 574), the claimant contended that the total discontinuance of the service was essential to a termination of the contract; but in response to that contention the court said: "We cannot accede to this narrow construction of the powers given the Postmaster General by the terms of this contract. He is given general power to increase, decrease, or extend the service contracted for, without change of pay. Furthermore, whenever the public interests in his judgment require it, he may discontinue the entire service. We think the advertisement and the regulations under which this contract was made and the contract as entered into were intended to permit the Postmaster General, when in his judgment the public interest requires it, to terminate the contract, and if a service of a different character has become necessary in his opinion, to put an end to the former service upon the stipulated indemnity of one month's extra pay being given to the contractor. It is not reasonable to hold that the power given to the Postmaster General for the public interest can only be exercised when the mail service in the district is to be entirely abandoned." * * *

"The authority given to the Postmaster General is broad and com-

prehensive, requiring him to exercise his judgment to end the service, and thereby terminate the contract, whenever the public interest shall demand such a change. In that event the contractor takes the risk that the exercise of this authority might leave him only the indemnity stipulated for—one month's extra pay." * * *

"Our conclusion is that, acting in good faith, of which there is every presumption in favor of the conduct of so important a department of the Government, the Postmaster General may, as was done in this case, discontinue the service, and thereby put an end to the contract when the public interest, of which he is the sole judge, authorizes such action." (See also Travis v. United States, 196 U. S., 239.)

It will thus be seen that the decision of the Postmaster General, in the absence of fraud, not charged, to discontinue the service in whole or in part is not open to review by the courts.

The further contention of the claimant to the effect that because a portion of the service so discontinued was permitted to be performed by others without first giving the claimant an opporuntiy to perform was an arbitrary exercise of power is not well taken, as by the terms of the postal regulations recited the Postmaster General was empowered to "discontinue or curtail the service, in whole or in part, in order to place on the route superior service, or whenever the public interest, in his judgment, shall require such discontinuance or curtailment for any other cause, he allowing as full indemnity to the contractor one month's extra pay on the amount of service dispensed with."

From what we have said, notwithstanding the hardships imposed upon the claimant in discontinuing the service, the demurrer must be sustained, which is accordingly done, and the petition dismissed.

35 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the fourth day of December 1911, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendant and do order, adjudge and decree, that the demurrer be sustained and that the petition of the claimant, John Miller, be and the same is hereby dismissed.

BY THE COURT.

36 VI. *Application for and Allowance of Appeal.*

The claimant makes application for an appeal to the Supreme Court of the United States from the judgment heretofore rendered by this Court.

DUDLEY & MICHENER,
Attorneys for Claimant.

Filed January 16, 1912.

Ordered: That the above appeal be allowed as prayed for.
January 16, 1912.
By the Court.

STANTON J PEELLE,
Chief Justice.

37 In the Court of Claims.

No. 30790.

JOHN MILLER
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the opinion of the Court; of the final judgment of the Court; of the application of the claimant for, and the allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 24th day of January, 1912.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk, Court of Claims.

Endorsed on cover: File No. 23,034. Court of Claims. Term No. 533. John Miller, appellant, vs. The United States. Filed January 25th, 1912. File No. 23,034.

17

Supreme Court of the United States.

OCTOBER TERM, 1913.

JOHN MILLER,
Appellant
vs.
THE UNITED STATES. } No. 178.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

J. D. BEARD & SONS, LAW PRINTERS, 707 6TH ST. N. W., WASH. D. C.

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Supreme Court of the United States.

OCTOBER TERM, 1913.

JOHN MILLER,
Appellant,
vs.
THE UNITED STATES. } No. 178.

APPELLANT'S BRIEF.

Statement of the Case.

I.

This case comes here on appeal from the Court of Claims, and it is reported in 47 C. Cls., 146. The case is based on a contract dated Feb. 1, 1906, for carrying the mails from Valdez to Eagle, Alaska, and back, once a week, from Nov. 1 to April 30, and twice a month from May 1 to Oct. 31, each year, in a close connection at Valdez with steamers to and from Seattle, Wash., at the rate of $46,000 per annum, "for and during the term beginning" July 1, 1906, and ending June 30, 1910 (Rec. 2). The route described in the contract was 458 miles long (Rec. 14, 15).

II.

The contract was executed by John R. Crittenden, and appellant Miller was one of his sureties (Rec. 2). Crittenden was unable to command the necessary capital to perform the contract, and, "therefore, appellant was obliged to and did expend the money needed to buy harness, sleds, horse feed, horses and dogs to carry the mails, and by July 1, 1906, the contractor and petitioner [appellant] as his surety, was ready to begin the performance of the contract, and the contract was performed to the satisfaction of the Government until the service was . . . discontinued by the Postmaster General" (Rec. 8).

Afterwards, May 1, 1908, Crittenden entered into a contract of sub-letting with appellant, by which the latter undertook to carry the mails on the route under the contract of February 1, 1906 (Rec. 8). That contract had the written consent of the Postmaster General (Rec. 9), and appellant alone performed the original contract (Rec. 8, 10-16).

When it developed that Crittenden was not able to command the capital above mentioned, appellant advanced $15,000 for the first year's supplies and entered into a contract of partnership with Crittenden, so as to be protected in his advances and make sure that the contract should be performed. That partnership was dissolved by mutual consent February 15, 1908, but the relation of principal and surety existed until the end.

III.

For many years the regulations adopted and enforced

by the Department have authorized the Postmaster General to discontinue or curtail the service, in whole or in part, in order to secure a "better degree of service" or "superior service," or whenever the public interest, in his judgment, should require such discontinuance or curtailment for any other cause, he allowing, as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and pro rata compensation for the amount of service retained and continued. Prior to 1874, and afterwards, regulation 263 dealt with that subject. Before 1893 it was amended and stood as section 817, but subsequently it was slightly amended and made section 1277. Those sections are copied on Rec. 6, 7.

The regulation, whatever its language or its number, was not drawn and promulgated with reference to the conditions existing in Alaska on Route No. 78108 during the period covered by the contract, but it was drawn and promulgated with reference to conditions existing within the limits of the United States and exclusive of that route in Alaska, and particularly without reference to the described conditions existing in that part of Alaska covered by the contract sued on (Rec. 7).

IV.

In the preparation of the forms of advertisement, proposal, and contract the government officials adopted the regulation in force, and such advertisement, proposal, and contract were drawn and printed for general use, and the proposal and contract were presented for execution, without particular regard to the physical, climatic, or

other conditions then existing or that might exist along the route during the contract period of four years. At the execution of the proposal and contract, and of the subsequent contract of subletting, Crittenden and appellant did not think or believe that the contract would be discontinued or terminated in any manner or form, but, on the contrary, they believed that the contract would be in full force and effect during the whole contract period, and they named the amount of annual compensation in that belief. They expected that they would encounter losses of profits in a portion of the contract period, but would earn good profits before the contract period ended, and for the whole contract period. Had Crittenden and appellant believed otherwise than as above stated, they would not have executed either of the contracts for that annual compensation, nor would appellant have made the arrangements and expenditures in the early part of 1903 [1908], in the record described. On the contrary, appellant made such arrangements and expenditures in the belief that the contract would be in force for the full contract period. If the government had asked bids for a two-year contract on that route Crittenden would not have submitted a bid at all, and appellant would not have become surety on any contract for less than $92,000 per annum, because the conditions were such that the expenses of carrying the mails on the route would be far heavier for carrying them in 1906 than in 1907, and in 1907 than in 1908, and in 1908 than in 1909. As an illustration, appellant avers that it cost $151,169.55 to perform the contract until it was discontinued by order of the Postmaster General, that amount being $48,595.08 more than the total sum received from the government,

but it would only have cost him $43,390 to perform the contract for the remaining twenty-two months of the contract period, during which time he would have received $84,326.00 for carrying the mails, a profit of $40,936 (Rec. 7).

V.

The existing physical and climatic conditions in that region are set forth in much detail in the ninth and tenth parts of the petition (Rec. 10-13), and we find it impossible to summarize them briefly. We can only say that they would seem appalling to any but those brave and hardy men who have carried the blessings and the necessities of civilization into the far North.

It seems almost incredible that men and horses were able to exist in the conditions described in the petition. Some were frozen to death but the work went on just as appellant had agreed. Wherever a work has to be done the men are raised up to do it, and in this instance horses, bridges, trails and roads were built, repaired, maintained, and left for the use of those who traversed that dreadful region (Rec. 12, 13, 14).

The petition alleges that the described physical and climatic conditions were matters of common knowledge in that part of Alaska, and were known to the agents of the Department (Rec. 12).

VI.

The ninth and tenth parts of the petition (Rec. 10-13) deal specially with the state of things and the performance of the contract in 1906, 1907, 1908, while the

eleventh sets forth the large, necessary and costly outfit put on the route by appellant for 1908 and the winter and spring of 1909, in the belief that the contract would be in force to the end of the contract period. While the expenditures were large, yet appellant was able to cut them down greatly for the summer of 1908 and subsequently. Conditions were getting better and the business was going on nicely. Trail and bridge work was done so the contract might be performed, as the Government did not make allowance for delays, whether caused by snows, storms, blizzards, the freeze-up in the fall, the break-up in the spring, or any other consideration, but fines were charged at every opportunity (Rec. 13, 14).

It is alleged that these facts and conditions were matters of common knowledge in that part of Alaska, and were known to the agents of the Department (Rec. 13).

VII.

August 11, 1908, the Postmaster General decided, and appellant was notified later, that the service on the route should be discontinued September 30, 1908, and that he would be allowed one month's pay. If he had been informed in February, 1908, that the service would be discontinued in whole or in part he would not have gone to the expense of putting the one year's supplies on the trail between Valdez and Eagle. Most of the horse-feed between Chistochina and Ketchumstock was lost. It had taken two years to get the trail in good condition for carrying the mails, the amount of which in that time had increased largely, for the country was settling up with ranchmen, prospectors, and mining men. If the

government had let the contract run the entire four-year term, appellant could have made enough money out of the performance of the contract to have recouped about all the losses sustained. The service was discontinued at a time when the contract had a year and nine months to run, in which time petitioner would have earned $84,-326 under the contract, and have made profits that would have reimbursed about all the losses previously sustained.

In 1906 and 1907, the freight rates on supplies had cost petitioner heavily. For instance, the rates from Valdez to Chistochina were 22 cents per pound, and to Mantasta 32 cents per pound. But in 1908 the freight rates had been reduced enormously, because the trails were improving, and the government was expending large sums of money in repairing the trail between Valdez and Gulkana, these improvements assuring good trails in the future and much lower freight charges. By the spring of 1910, the freight rates had dropped off one-half from what they were three and four years before.

As soon as the government road had been put in condition, the mail men used wagons between Valdez and Gulkana, and while it had taken six or seven horses to carry the mails by appellant between the points named, two horses hitched to a buckboard carried the same mails for the new contractors and made better time; fewer men were needed and the service cost much less than before. These conditions, and all other controllable conditions, would have been to the advantage of appellant, and would have enabled him to recoup the loss that he had incurred up to September 30, 1908.

The following is a profit and loss statement for the period covering the actual life of the contract:

Disbursements on account of labor, feed, expenses on the route, including expenses of maintaining stations, etc.....	$110,040.03
Disbursements on account of Scott & Frase, sub-contractors	41,129.52
Total disbursements.....	$151,169.55
Total receipts from the Post Office Department	$102,572.41
Total losses	$48,597.14

(Rec. 14, 15.)

VIII.

The thirteenth part of the petition (Rec. 15, 16) sets forth orders made by the Postmaster General, beginning Aug. 11, 1908, discontinuing the service on route 78108 to take effect Sept. 30, 1908, and immediately and thereafter establishing service on various parts of that route.

The service in the region covered by route 78108 was not discontinued except as to that part between Chicken and the junction of the Chistochina and Copper rivers, a distance of 190 miles, and in the remainder of the region covered by route 78108 service was continued from September 30, 1908, as is shown by the orders, fewer trips being made and less weights being carried. The orders operated as a change of service only on route 78108, except as to the discontinuance of mail service between Chicken and the junction of the Chistochina and Copper rivers.

The Postmaster General did not ask appellant to con-

sent to any modification of the contract, or to its discontinuance, nor did he advertise that proposals would be received for changes in the terms of such contract.

All the points named in those orders had been faithfully served under the contract in suit, and appellant could and would have performed the contract at a profit to himself of $48,936 for the remainder of the contract period; and the performance of the contract would have enabled him also, to avoid losing the property in 1908 and 1909, in the sum of $5,800 for horse-feed alone, and $5,000 for buildings, which loses could and would have been avoided through performance of the contract.

Appellant was excluded from the performance of such services by the Postmaster General, to his great loss and damage, over his objections and protests, and against his wishes and desires (Rec. 15, 16).

IX.

This action was brought to recover damages for profits and property lost (Rec. 16).

The Record Below.

Petition was filed in the court below Jan. 4, 1911 (Rec. 1). General demurrer was filed Jan. 25, 1911 (Rec. 17). The opinion of the court was filed Dec. 4, 1911 (Rec. 17-20). The demurrer was sustained and the petition was dismissed on the same date (Rec. 20). Application for appeal was made and allowed Jan. 16, 1912 (Rec. 20, 21).

Errata.

At some places in the record, such as pp. 7, 10, the year appears as 1903 when it should be 1908, and as 1905 when it should be 1906, as the context shows.

Assignment of Errors.

The court below erred:

First. In sustaining the demurrer to the petition.

Second. In adjudging that the petition be dismissed.

Brief of Argument.

I.

Rule for Construing the Contract.

In the construction of the contract, or any particular clause or part of it, the court is to examine the entire contract, consider the relations of the parties, their connection with the subject-matter, the circumstances under which it was signed, the state of things existing at the time it was made, the nature of the obligations between the parties, and is to look carefully to the substance of the agreement as contra-distinguished from its mere form, in order to give it a fair and just construction, and ascertain the substantial intent of the parties.

This rule has been established by a long line of decisions, among them are:

Canal Co. v. Hill, 15 Wall., 94, 99-101;

Rock Island Railway v. Rio Grande Railroad, 143 U. S., 596, 609;

Winona & St. Peter Land Co. v. Minnesota, 159 U. S., 526, 531;

U. S. v. Utah, Nev. & Cal. Stage Co., 199 U. S., 414, 423.

We shall make particular use later of the case last cited.

The state of things existing in Alaska at the time the contract was made, during its performance, and at its termination is set forth with detail in the petition for the purpose of informing the court as to the conditions with which the parties had to deal. It is essential that the court be informed of these conditions in order that it may correctly understand the intent of the parties and be able to put the right construction on the contract, and that is why they were set forth in the petition in such detail (Rec. 10-14).

The state of things existing at the time the contract was made, and the purpose of extending the advantages of civilization to a remote region under circumstances of extreme difficulty and at a heavy expense to the contractor, particularly in the earlier years of the contract, naturally and inevitably made the contractor believe, and he did believe, that he would have the whole contract period in which to reimburse himself that enormous outlay and also secure a profit. The business could not have been done on any other basis, and it was done on exactly that basis in this instance, as the petition avers (Rec. 7, 9, 13).

We will now enumerate some of the considerations that we think to be of controlling force in this case.

(a) The nature of the service to be rendered, the disbursements to be made on account of labor, food, sup-

plies, horse-feed, equipment of all kinds, erecting and maintaining stations, houses, cabins and cache houses on the route, making and maintaining trails, roads, and bridges, the general expenses of the service, etc., laying in and placing along the route necessary supplies of all kinds each winter, and procuring expensive outfits to enable the contractor to perform the service for each year (Rec. 2-6, 7, 8, 10-15).

(b) It was necessary to expend $15,000 in the purchase of horses, harness, sleds, horse-feed, and dogs in beginning the rendition of the service (Rec. 8, 10), and by the fall of 1905 [1906] appellant had expended more than $20,000 before any payments were made by the government (Rec. 10), and the necessary equipment had to be maintained and added to during the whole period of service (Rec. 12-16).

(c) The freight rates in 1906 and 1907 from Valdez to Chistochina were 22 cents per pound, or $440 per ton, and to Mantasta were 32 cents per pound, or $640 per ton (Rec. 14), in March and April, 1907, the contractor, in making a shipment of twenty tons of horsefeed from Fairbanks to Tanana Crossing paid 16½ cents per pound, or $330 per ton, for transportation, that being the lowest freight charge obtainable, and in 1908 the freight on horse-feed cost him from eight cents per pound, or $160 per ton, to 11½ cents per pound, or $230 per ton (Rec. 12-14). To those rates must be added the cost of food for the men and feed for the horses at the coast and on the Yukon, and the necessity of taking the same to the various stations in the winter, when sleds could be used, thus laying up supplies for one year in advance, for it was necessary that food stuffs and

supplies for the men and the horses had to be purchased and taken to the various stations in the winter for a year in advance (Rec. 12-14 and *passim*).

(d) We know that the experience of all contractors, in the performance of a contract embracing unusual or severe conditions, is that by far the heavier part of the expenditures fall within the first half or two-thirds of the contract period, and that the lighter expenditures fall in the remaining or latter part of the period. The conditions confronting the contracting parties here were such as to make it apparent to them that such would be the experience of the contractor, and that his only hope of compensation, to say nothing of earning profits, lay in the belief that the government would not discontinue the service at any time during the four-year period (Rec. 7, 9, 13).

(e) If the contract had been made for one year it would have been inevitably for a far larger sum than $46,000 per annum, and the same would have been true had the contract been made for two years (Rec. 7) or if it had been made to expire September 30, 1908, the date the discontinuance was made effective. It is not reasonable that the contractor would have named $46,000 as the annual compensation for a contract period of less than four years. The length of the contract period was the inducement which caused him to name that amount as annual compensation. It stands to reason, and it is a fact, that a shorter period than four years would have resulted in a corresponding increase in the amount of annual compensation fixed by the contractor (Rec. 7).

(f) The contract required the contractor to carry the

mails at the annual compensation of $46,000, "for and during the term beginning" July 1, 1906, "and ending" June 30, 1910 (Rec. 2), and it obligated the contractor in its next paragraph to "carry said mail with certainty, celerity, and security, . . . during the term of this contract" (Rec. 2). Near the end of the contract (Rec. 6) there is a stipulation that the contract, in the discretion of the Postmaster General, may be continued in force beyond its express term for a period of six months, until a new contract with the same or other contractor should be made (Rec. 6). The use of all this formal and positive language must have encouraged the belief of the contractor and his sureties that the contract would be in force four years at least.

Having in mind all these things, we now ask this question: Is it possible that one month's extra allowance was intended by all the parties to be in compensation of the inevitably large losses,—far larger than one month's extra pay,—if the *entire service* were to be discontinued at any time, and under any circumstances, at the option of the Department?

II.

Construction To Be Put On the Discontinuance Stipulation. Plan For Future Relief Suggested.

The discontinuance stipulation should be so construed as not to apply to a case in which the payment of one month's extra pay would be grossly inadequate as indemnity or compensation to the contractor.

The "discontinuance" stipulation (Rec. 4), is as follows:

> It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, by allowing not to exceed a pro rata increase of compensation for any additional service thereby required; and, in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with, and not to exceed a pro rata compensation for the service retained; but no increase of compensation shall be allowed for a change of service not amounting to an increase, nor indemnity of month's extra pay for any change of service not involving a decrease of service.

1. The stipulation as to the amount of the "full indemnity" of one month's extra pay on the amount of service dispensed with applies alike to "decrease, curtailment, or discontinuance of service." We submit that this stipulation may be fair enough in case of decrease or curtailment and yet grossly unjust in case of discontinuance. A decrease or curtailment might reduce the cost of service to the contractor and be of little or no damage to him, while a discontinuance might be of immense damage. The literal and strict construction of this stipulation would produce that result in the case at bar, but such a result is to be avoided if possible within the rules of law, as we shall see presently.

Is it not more reasonable and just to all concerned, interpreting the contract with the then existing state of

things in mind, as well as the certainties of the future, to hold that the provision for one month's extra pay—$3,833.33—as a "full indemnity" was intended to apply to a situation entirely beyond the scope of this particular action—a situation in which the payment of that amount of money would be "full indemnity" to the contractor for the losses incurred? We submit that this contract should be so interpreted as to apply only to a case in which the payment of that sum would fully indemnify the contractor, and not apply to a case in which it would be grossly inadequate as indemnity for the loss or damages.

2. We submit that *United States v. Utah, Nevada & California Stage Company*, 199 U. S., 414, is both instructive and conclusive here. The company entered into a contract for the rendition of service on a mail route in the city of New York for four years. The advertisement (p. 415) notified contractors that they would be "required to perform, without additional compensation, any and all new or additional service that may be ordered from July 1, 1893, or at any time thereafter during the contract term," etc. The contract (p. 416) stipulated that the contractor should "perform all new or additional or changed covered regulation wagon, mail messenger transfer, mail station service that the Postmaster General may order at the city of New York, N. Y., during the contract term, without additional compensation," etc. August 22, 1893, the Department required (p. 417) additional mail service and a further order was made October 23, 1893, for additional mail station service. The additions to the service were large and burdensome (pp. 417-421, 424). The Court of Claims rendered judg-

ment in favor of the company for $83,021 (39 C. Cls., 420, 441).

In this court the government contended (p. 421) that, under the authority of the Postmaster General to require new or additional service without additional compensation, the contractor might be required to perform the additional service made necessary by the establishment of the Industrial Building branch under the authority of the Act of Congress of March 3, 1893. The opinion was written by Mr. Justice Day, who said (pp. 422, 423):

> In order to perform this service under the directions of the department, complainant was required to furnish eighty additional horses, more than thirty additional wagons, and from thirty-three to fifty additional men, requiring an additional distance to be travelled in wagons, over and above the normal increase of 311,939 miles for the period from October 5, 1893, to February 6, 1895, and to pay an increased sum for ferrying the wagons across the North and East Rivers of $9,950.22. Can such enormous increase of the service required and the expense entailed be exacted of a contractor who had agreed to perform new or additional service of the kind specified without additional compensation? There can be no doubt that the purpose of placing this stipulation in the contract was to require the performance, without additional compensation, of new or additional service which might arise from improved methods in the transaction of the business of the Post Office Department and in the increased demand for service resulting from the growth and development of towns and cities.

The opinion then proceeds:

> The contract gave to the Postmaster General

very considerable discretion in calling for additional service which might result from these causes, without compensation. This was well illustrated in the case of *Slavens* v. *United States*, 196 U. S., 229, in which it was held that while the Postmaster General might not order, under such a contract, service of a different character not within the contractual arrangement, he might order, without additional compensation, a change in the service which required the mail to be taken to and from street cars, met at crossings instead of landings and stations. In that case it happened the burden upon the contractor was not increased. But in the present case we find more service required, amounting to additional mileage of hundreds of thousands of miles, and the payment of a large additional sum of money for ferrying wagons to deliver the mails.

Mr. Justice Day next said:

There must be some limit to the service which can be required without additional compensation, under the authority vested in the Postmaster General by the contract, to call for new or additional service of the same character. Otherwise it is within the power of the government to ruin a contractor by new and wholly unanticipated demands, which caution and prudence, however great, could not have foreseen. If this were a contract between individuals a claim of the right to require this vast amount of additional work—evidently not within the contemplation of the parties—without additional compensation, would hardly be seriously entertained. The same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the government and individuals.

The opinion then cites and quotes from cases, holding that in giving a proper construction the court is required to examine the entire contract, consider the relation of the parties and the circumstances under which it was signed, the nature of the obligations between them, and ascertain the substantial intent of the parties in order that it might be given a fair and just construction. Then Mr. Justice Day said (p. 424):

> In this case, after the contract was entered into, this enormous new service, clearly not intended by either of the parties to be rendered, was required. In this instance we think the limit of reasonable requirement under the new and additional service clause was exceeded and the service required cannot be held to be within the terms of the contract. We find no error in the Court of Claims reaching this conclusion.

Here we have a contract stipulation as rigid in terms as the one in the case at bar, and no more rigid, but this court held that the enormous new service was clearly not intended by either of the parties to be rendered, and that the service required was not within the terms of the contract. So, in the case at bar, and upon the same line of reasoning, as we submit, it should be held that the stipulation for the receipt of one month's pay, $3,833.33, in view of the state of things existing and the nature of the obligations, is not to be held applicable to the case in hand.

If this were a contract between individuals the argument that the defendant had been given the right, in the state of things existing on the route and the nature of the obligations, to put an end to the contract and compensate the contractor for his damages by allowing him $3,833.33 would hardly be entertained seriously.

3. The case we have been quoting from was approved and relied upon in *Serralles' Succession* v. *Esbri,* 200 U. S., 103, 113. The question there was whether the contract entitled the appellee to payment on one basis or another, the difference being over sixty per cent more than the value of the thing purchased and sold. After approving the doctrine of the *Utah, Nev. & Cal. Stage Company case,* Mr. Justice Peckham (pp. 113, 114), stated some of the conditions existing at the time the contract was made and said:

> Under the circumstances it is impossible to conceive of sane persons agreeing in this case upon the value of the interest purchased and sold, and then that the purchaser should further agree to pay over sixty per cent more than the value of the thing purchased if it should so happen in the future that different coinage might be in circulation, under a different sovereignty, which would effect that result.

So we say, in the case at bar, that it is impossible, in view of the state of things existing and to exist on the route, to conceive of sane persons agreeing that one month's extra pay—$3,833.33—should be taken as full indemnity on the discontinuance of the contract whenever made and no matter how great the loss and damage to the contractor might be.

Mr. Justice Peckham continued:

> The question may be asked, what did the parties mean by this use of language, if they did not mean precisely what the courts below have said they did, and where is the justification for changing the interpretation as gathered from their lan-

> guage? It may not, perhaps, always be clear to see and determine what parties did mean by the language they used in a contract, and at the same time it may be perfectly clear they did not mean to contract with reference to what the courts below have called the literal and specific import of the language actually used.

We submit that the language quoted is particularly applicable to the case at bar.

"The best construction," said Gibson, C. J., "is that which is made by viewing the subject of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it. A result thus obtained is exactly what is obtained from the cardinal rule of intention."

Schuylkill Nav. Co. v. Moore, 2 Whart., 491.

We submit that the "mass of mankind" would view this contract as vesting in the Postmaster General the power to give one month's extra pay as "full indemnity" on discontinuance whenever that amount would compensate the contractor for his loss or damage, and as not vesting power beyond that point, certainly not when the contractor would meet with a very heavy loss or damage.

4. *But there is a way to avoid such calamities as this.* It would be easy to do full justice to all parties in unusual, exceptional, or difficult cases of mail service contracts by stipulating that, on the discontinuance of service by the Postmaster General, there should be paid to the contractor a certain specified sum or percentage if such action should become effective in one month, another amount or percentage if it should become effective in three months, and so on, thus dividing the contract period

into appropriate parts and fixing a specific sum or percentage of indemnity for each part. In that way the possible or probable discontinuance of service would be brought so sharply to the attention of the parties that they would consider and discuss the whole situation and agree upon the fair and just division of the contract period, as well as the respective amounts or percentages of indemnity to be paid. Such a stipulation could be so written as to be a complete and lawful ascertainment and liquidation of damages. *Sun Printing and Pub. Assn.* v. *Moore,* 183 U. S., 642.

A stipulation of that kind in this contract would have prevented this litigation.

III.

Arbitrary Or Unreasonable Conduct.

This contract is not to be so construed as to give the officer the power to do arbitrary, capricious, oppressive, or unreasonable things, to the cost or damage of the contractor, for it is implied that the officer will do nothing of the kind.

That is the statement of a well-established rule of law.

U. S. v. *N. A. Com. Co.,* 74 Fed., 145, 149;
Lewman's Case, 41 C. Cls., 470, 478;
Ripley v. *U. S.,* 223 U. S., 695, 701.

1. It is averred in the petition (Rec. 12, 13) that the state of things existing on the route was a matter of

common knowledge in that part of Alaska, and was known to the agents of the Department. Those averments make particularly pertinent the argument of Judge Davis in *Griffith's case*, 22 C. Cls., 165, 193:

> The Postmaster General had to aid him in the decision of this case, the vast and complete machinery of his Department, and must have had all the information as to this route which it was possible for anyone, including this contractor, to obtain. The local postmasters were reporting to him regularly, while the officers of the inspection division were watching this route as they did all other star routes, and, in fulfillment of the duties placed upon them by the regulations, were keeping the Department informed as to the business being done and the manner in which it was done.

Other noteworthy facts are that the contract of subletting (Rec. 8, 9) was entered into between Crittenden and this appellant May 1, 1908, and consented to by the Postmaster General, presumably not earlier than June 1, 1908, while the order of discontinuance is dated August 11, 1908.

2. Again, it is averred in the petition (Rec. 16):

> The mail service in the region covered by route 78108 was not discontinued except as to that part between Chicken and the junction of the Chistochina and Copper rivers, a distance of 190 miles, and in the remainder of the region covered by route 78108 mail service was continued from September 30, 1908, as is shown by the above named orders, fewer trips being made and less

> weights being carried, as stated. The orders named operated as a change of service only on route 78108, except as to the discontinuance of mail service between Chicken and the junction of the Chistochina and Copper rivers, as above stated. The Postmaster General did not ask petitioner to consent to any modification of the contract or to its discontinuance nor did the Postmaster General advertise that proposals would be received for changes in the terms of such contract, in accordance with section 3958, Rev. Stat. concerning changes in contracts.

The averments show an actual discontinuance of service on 190 miles out of the 458 miles of the route (Rec. 15) and that the contractor was not asked to consent to any modification or deduction, or to the discontinuance of the service, nor did the Postmaster General advertise that proposals would be received (Rec. 16). On the contrary, and on the very day the Department ordered the discontinuance of this service, it made two orders, giving parts of the route to other contractors, and it followed up with later orders giving service on other portions of the route to other parties (Rec. 15, 16).

Bad faith is not charged here against the Postmaster General, but the facts pleaded do establish the abuse of power, or the arbitrary, or capricious, or unreasonable exercise of power, without proper regard to the damage done the contractor, and without giving heed to the state of things existing when the contract was made and during the contract period. Neither the law nor the contract vested in the Postmaster General the right to abuse power, or exercise power arbitrarily, capriciously or unreasonably, to the great injury of the contractor, and

without regard to the conditions existing before and during the contract period.

To paraphrase and yet adopt the language and ruling of Mr. Justice Jackson in *C. M. & St. P. Ry. Co. v. Hoyt*, 149 U. S., 1, 15, the discontinuance of the service, in the conditions and circumstances set forth in the petition, cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, and they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterward happened.

It would be unreasonable to suppose it to have been within the contemplation of the contracting parties here that the government had the right to do or would do that which was done by the order of the Department August 11, 1908. Had such a thing been within the contemplation of the contractor he would have felt himself obliged to name such increased rate of compensation as would have made him safe and whole against such an act or proceeding by the Postmaster General (Rec. 7, 9, 14).

3. In the case of *U. S. v. Utah, Nev. & Cal. Stage Co.*, 199 U. S., 414, Mr. Justice Day differentiated *Slavens v. U. S.*, 196 U. S., 229, by pointing out (p. 422) that there "it happened that the burden upon the contractor was not increased," but the case is interesting otherwise.

Slavens entered into a contract for transporting the mails in Boston, Brooklyn and Omaha. This was city service. During the terms of the Boston and Brooklyn contracts the Postmaster General determined to carry certain of the mails on electric street railway lines. "In

both cases the appellant was offered the privilege of continuing the contract for the reduced service, but refused to do so in each case" (p. 230). The Postmaster General discontinued the Boston and Brooklyn contracts and afterwards relet the same service, as thus reduced, to another contractor, for the remaining seventeen months of the contract period. This court held that the Postmaster General had the power to do what he did concerning those contracts and the reletting of the remaining service. The court declined (p. 234) to say that the Postmaster General, merely for the purpose of reletting the contract at a lower rate, might advertise and relet precisely the same service for the purpose of making a more favorable contract for the government, no change having arisen in the situation except the desire for a better bargain.

And the court also said, page 235: "In the present case the findings of fact *do not disclose a case of the arbitrary exercise of power.* A new means of service within the district by means of the street railway was deemed by the Postmaster General to be required in the public interest." (Italics ours.)

And again (p. 235) the court said: "Under the Postal Regulations it appears that the contractor is given the opportunity to perform the reduced service at a lower rate. This he was not obliged to do, and, in the present case, declined to undertake."

The court then took up the regulations and (p. 237) said: "We think this change of service was fairly within the power reserved to the Postmaster General, and the right given to him to designate such changes in the service as the public interest might require in the performance of this contract."

The court guarded the language of its opinion with care, and it is not to be interpreted as giving to the Postmaster General the right to exercise power arbitrarily, or capriciously, or oppressively, or unreasonably to the great damage of the contractor.

In the statement of the case (p. 229) Mr. Justice Day referred for fuller details to the finding in the Court of Claims, 38 C. Cl., 574. By turning to finding XIV, XV, p. 582 of that report, it will be seen that Slavens had been offered previously the privilege of continuing the service at a reduction from the contract rate in the Boston case, which he declined, and thereupon, "in order to have the service as thus reorganized performed," the service by Slavens was discontinued, and "immediately thereafter defendants relet the same service as decreased . . . to another for the balance of the contract period."

We submit that it is clear that there was no arbitrary, capricious, oppressive or unreasonable action by the Postmaster General in that case. On the contrary, Slavens was given every reasonable opportunity to prevent or at least diminish his losses, but nothing of the kind was done in the case at bar by the Postmaster General. The failure of that officer to do in this case what was done by him in the *Slavens case* indicates a marked disregard of the contractor's welfare, to say the best of it, and it does not matter that the officer was not directed or required to do those things by the contract or the law. The failure of the officer to do those things, the existing state of things and the nature of the obligations being considered, is quite material in considering whether his conduct in discontinuing the contract was abritary

or not, capricious or not, oppressive or not, reasonable or unreasonable.

The contractor was entitled to fair play, and the officer could have given it to him, for there was neither law nor contract to forbid.

4. A case relied upon below in part by counsel for the defense was *Garfielde v. U. S.*, 93 U. S., 242. There the Postmaster General made a contract with Garfielde March 2, 1874, and the service was discontinued the month following. Garfielde sued for one month's extra pay and this court held that the regulations empowered the Postmaster General to discontinue the service and allow one month's extra pay. Garfielde had made a proposal that was accepted by the Department in the form of a letter, but no formal contract was drawn.

The case turned on the power of the Postmaster General to discontinue the service under the regulations, and this court held that he had that power.

IV.

The Regulations Considered.

The long existing regulations are of importance here because their substance was incorporated in the contract.

The petition (pp. 6, 7) copies certain long existing regulations and it avers that the one existing at the date of the contract was not drawn and promulgated with reference to the conditions existing in Alaska on this route during the contract period, but it was drawn and promulgated with reference to conditions existing with-

in the limits of the United States and exclusive of that route in Alaska.

Those averments are in harmony with our argument that the contract, as well as the regulations underlying it, must be considered and construed in connection with the knowledge the parties had as to the state of things existing along the route and in that part of Alaska.

The underlying regulation, Sec. 1277 (Rec. 7) is of no importance further than as it formed the basis for the contract provisions that we have been discussing. The fact that it was drawn and promulgated in 1893, thirteen years before the making of the contract in suit, February 1, 1906, long before Route 78108 was in existence, and long before there was any development of Alaska beyond the sea coast, is conclusive proof that it was not drawn with reference to the state of things described in the petition.

The contract provision under consideration here is plainly bottomed on Regulation 1277, and it is squarely averred in the petition (Rec. 7) that, in the preparation of the proposal and contract, the government officials *adopted the regulation in force, and the contract form long in use*, and without particular regard to the physical, climatic, or other conditions then existing or that might exist along the route during the contract period. All this brings the regulation and the contract itself within the rules of law that we are contending for the application of in this case. These allegations are of such a nature as to require the court to consider the facts alleged in determining what construction shall be put upon the contract in order that the intent may prevail, if our views of the law be sound.

V.

Annulment and Discontinuance.

"Annul" and "discontinue" are not equivalent or synonymous terms.

This is not a case of annulment. The Postmaster General had the power of annulment, under certain conditions elaborately set forth in the contract (Rec. 5) but this case does not fall within that stipulation. What the Postmaster General did was under his construction of the contract provision on p. 6, and it is on that provision that the case turns. In the case at bar there was a "discontinuance" only. The use of the word "annul" as equivalent to the word "discontinue" is inaccurate in cases of this kind, no matter whether found in the briefs of counsel or in the opinions of the courts, as we submit.

VI.

The Measure of Damages.

The damages here include loss of profits and loss of property.

1. That a contractor may recover the amount of profits lost is clearly established by—

Hinckley v. Pittsburgh, etc., Steel Co., 121 U. S., 264, 275;

Anvil Min. Co. v. Humble, 153 U. S., 540, 549;

Bochm v. Horst, 178 U. S., 1, 15.

2. It is a fundamental rule that the injured contractor is entitled to be made whole. In the application of this rule, damages are allowed for his personal property lost.

Figh's case, 8 C. Cls., 319, 324, 325;
Roetinger's case, 26 C. Cls., 391, 398, 408.

We submit that the judgment of the court below should be reversed.

LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

IN THE

Supreme Court of the United States.

JOHN MILLER,
Appellant,

vs.

THE UNITED STATES.

No. 178.

CLAIMANT'S REPLY BRIEF.

LOUIS T. MICHENER,
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IN THE

Supreme Court of the United States.

JOHN MILLER,
Appellant,
vs.
THE UNITED STATES. } No. 178.

CLAIMANT'S REPLY BRIEF.

I.

Relations of Claimant to the Contract.

Counsel for the government (pages 9 and 10 of his brief) makes the point that there are two contracts in the petition, the first one being between Crittenden and the government, the second being the contract of sub-letting, and then he asks, "Did there not then arise a contract between the government and Miller, and does not the claim grow out of the Miller contract?" This seems to make it desirable that we should show what are the relations of Miller to the Crittenden contract for the carrying of the mails.

1. Appellant was surety for Crittenden on the contract

for the carrying of the mails (R. 2, folios 3, 4; p. 4, folios, 6, 7; p. 5, folios 8, 9) and as surety he had to furnish and expend the money necessary to perform the contract because Crittenden was unable to do so. Appellant began these expenditures soon after the execution of the contract and continued until the contract was discontinued (R. 8, folio 6; p. 10, folio 16; p. 12, folio 20, *et seq.*). On that state of facts appellant had the legal right, indeed it was his legal duty, to perform the contract, and upon such performance he became entitled to recover in his own name for the losses and damages incurred.

United States v. Hitchcock, 164 U. S., 227;
United States v. Behan, 110 U. S., 338.

2. Appellant and Crittenden, May 1, 1908, entered into a contract of sub-letting (R. 8, folios 13-15) by the terms of which appellant agreed to perform the Crittenden contract for carrying the mails, and for the same compensation. That contract of sub-letting was made and filed as required by Sections 2 and 3 of the Act of May 17, 1878, 20 Stat., 61, 62. Section 2 prohibits the sub-letting or transfer of mail contracts except upon the consent in writing of the Postmaster General. Section 3 requires the contract of sub-letting to be filed in the office of the Second Assistant Postmaster General. Whereupon certain steps are to be taken by the government officials to make payments to the sub-contractor, "under the same rules and regulations now governing the payments made to original contractors."

Those sections were considered in *Salisbury v. United States*, 28 C. Cls., 52, and it was held that, where the contract was sub-let with the consent of the Postmaster

General, a privity of contract was created between the sub-contractor and the government upon which he could maintain an action in his own name for money due under the original contract.

II.

Arbitrary and Capricious Conduct.

Counsel for the government in his brief (pages 10 to 19) argues that the petition should have pleaded explicitly that there was bad faith on the part of the Postmaster General in discontinuing the contract. The petition does not charge bad faith or indulge in epithets of any kind. Opposing counsel's argument seems to be intended as in response to part III of our original brief (pp. 22-25), where we stated the familiar rule that a contract is not to be construed so as to give an officer the power to do arbitrary, capricious, oppressive, or unreasonable things to the cost or damage of the contractor, *for it is implied that the officer will do nothing of the kind.*

We submit that it was not necessary to charge the Postmaster General with bad faith in order to state a cause of action. If the Postmaster General acted beyond his rights and powers under the contract and the law, and damages resulted therefrom to the appellant, the right of action exists, and this is true no matter what the motives of the official may have been. The rule stated on page 22 of our original brief is not a rule of pleading, but we submit that it is a rule to be applied in the construction of the contract.

This case does not involve the powers of an officer, or

engineer, or inspector, or appraiser named or described as one who should decide and whose decision should be final and conclusive upon the contractor, but we may point out the well-established rule that their decisions must be in accordance with law and contract or they are not binding.

Robertson v. Frank Bros. Co., 132 U. S., 17, 24;
Lewis v. Chicago, etc., R. R., 49 Fed., 708;
Lyon's v. United States, 30 C. Cls., 352, 365.

III.

Technical Sufficiency of Petition.

Counsel for the government (pages 23-25 of his brief) argues that the petition should have been more exact and specific in describing the damages, to which we respond:

1. The averments in the petition concerning expenditures, values, and damages are sufficient (R. 10, folio 16; pp. 12-16). They are in harmony with 2 Chitty on Plead. 16th Am. ed., 37, 38.

2. We quote and apply the following from *District of Columbia v. Barnes*, 197 U. S., 146, 154:

> The Court of Claims is not bound by special rules of pleading. The main purpose is to arrive at and adjudicate the justice of alleged claims against the United States.
> *United States v. Burns*, 12 Wall., 246, 254;
> *United States v. Behan*, 110 U. S., 338, 347.

3. In proving damages it will be necessary for claim-

ant to comply strictly with the rules of evidence, and it will be incumbent on the court below to make clear and specific findings on the subject. Should it be found desirable the government may file a motion to make the petition more specific. The demurrer cannot be made to take the place of such a motion.

LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

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CASES AND REGULATIONS REFERRED TO.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

JOHN MILLER, APPELLANT,
v.
THE UNITED STATES.
No. 178.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT OF CASE.

In the above-entitled cause the petitioner and appellant, John Miller, a subcontractor, brought an action in the Court of Claims on an alleged breach of contract.

John Miller, the appellant, was surety on a contract executed by John R. Crittenden with the Postmaster General, dated February 1, 1906, for a term of four years, the purpose of which contract was the carrying of mail from Valdez to Eagle and other points in the Territory of Alaska. Crittenden was unable to carry out the contract, and on May 1, 1908, with the consent of the Postmaster General, sublet the contract to appellant.

On August 11, 1908, the Postmaster General ordered that on and after September 30, 1908, further mail service under the contract should be discontinued, with an allowance of one month's pay to the contractor.

Appellant concludes his petition with the statement that he was damaged as follows: (1) Loss of profits which would have accrued during the remainder of the contract period, $40,936; (2) losses incident to the erection of buildings and purchase of horse feed, $10,800; making in the aggregate $51,736, for which amount judgment was prayed.

Appellee demurred to the complaint on the ground that the same did not state a cause of action.

The demurrer was sustained. The opinion of the court below is found in 47 Court of Claims Reports, page 146.

CONTENTS OF PETITION.

It will be necessary in the following digest of the petition to include some matters which we believe have no place therein. It alleges in substance:

1. That on September 15, 1905, the United States advertised for proposals to carry the mails from Valdez to Eagle and certain other places in the Territory of Alaska, the names of which and also the schedules, etc., appear in said advertisement.

2. That John R. Crittenden submitted a proposal under said advertisement for carrying the mails on said route, which was known and described as route No. 78108, for the sum of $46,000 per annum.

3. That the proposal of said Crittenden was accepted, and on February 1, 1906, he entered into a contract with the Government, through and by the Postmaster General, for transporting the mails as aforesaid for and during the term of four years, beginning July 1, 1906, and ending June 30, 1910. He executed his bond, with the petitioner, John Miller, and one Charles H. Kraemer, residents of Alaska, as sureties thereon, for the faithful performance of his duties, which bond was duly approved.

4. That by the terms of said contract it was stipulated by the contractor and his sureties that the Postmaster General *might discontinue* or extend said contract, change the schedules, change the termini of the route, and alter, *increase*, *decrease*, or extend the service in accordance with law, etc., and *in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor there should be allowed one month's extra pay on the amount of service dispensed with*, and not to exceed a *pro rata* compensation for the service retained, but no increase of compensation should be allowed for a change of service not amounting to an increase, nor indemnity of one month's pay for any change of service not involving a decrease of service.

5. That the regulations of the Post Office Department in force at the time of the execution of said contract and during the term thereof provided that *the Postmaster General might discontinue or curtail the service on any mail route, in whole or in part*, in order to place on the route superior service, or whenever

the public interests, in his judgment, should require such discontinuance or curtailment for any cause, he *allowing as full indemnity to the contractor one month's extra pay on the amount of service dispensed with* and a pro rata compensation for the amount of service retained and continued.

6. That the regulations of the Post Office Department were not drawn with reference to the conditions existing in Alaska on route No. 78108, during the period covered by the contract, but were drawn and promulgated with reference to conditions existing within the limits of the United States and exclusive of said route in Alaska.

7. That the original contractor, Crittenden, was unable to command the capital necessary in the performance of the contract, and the petitioner was obliged to furnish large sums of money incident to the transportation of the mails under said contract.

8. That on May 1, 1908, the petitioner, with the written consent of the Postmaster General, entered into a contract with the original contractor, Crittenden, whereby he assumed all the obligations of the said contractor for conveying the mails on said route, subject to all the requirements of said contractor under his contract with the United States.

9. That on August 11, 1908, the Postmaster General decided, and *the petitioner was notified, that the mail service on said route would be discontinued on and after September 30, 1908, and that he would be allowed one month's extra pay.* The said contract was

accordingly terminated on the date last above mentioned.

10. That the mail service in the region covered by route No. 78108 was not discontinued, except as to that part between Chicken and the junction of the Chistochina and the Copper Rivers, a distance of 190 miles, and that the remainder of said region was covered by other routes during the remainder of said term.

11. That the contract was terminated without the consent of the petitioner, and that the Postmaster General failed to advertise that proposals would be received for changes in the terms of such contract, in accordance with section 3958, Revised Statutes, concerning changes in contracts.

12. That the following damages were sustained:

Loss of profits which would have accrued during the remaining portion of the four-year term	$40,936
Loss of buildings	5,000
Loss of horse feed	5,800
Total	51,736

(*a*) The petition does not allege that in discontinuing the contract entered into with appellant the Postmaster General was guilty of an act so arbitrary or capricious as to impute bad faith;

(*b*) Or that the appellant did not have full knowledge of the conditions in Alaska when he entered into the contract;

(*c*) Or that there was any ambiguity in the contract, or any facts upon which ambiguity could be predicated;

(*d*) Or that the Postmaster General called for an increase of service, or that there was any service rendered on the part of appellant in carrying the mails beyond that covered by the contract.

II.

ARGUMENT.

In the Court of Claims appellee demurred to the petition on the ground that it did not state a cause of action, and in reply to the brief and argument of appellee the appellant argued in support of his petition briefly—

(*a*) That the entire contract, the circumstances surrounding the signing and executing of same, and the physical conditions to which the contract was to be applied, should all be taken into consideration in interpreting the contract.

(*b*) That the discontinuance stipulation should not be construed to apply to a case in which the payment of one month's extra pay would be grossly inadequate as compensation to the contractor.

(*c*) That the Postmaster General was chargeable with an arbitrary, capricious, and unreasonable exercise of power in discontinuing the contract.

(*d*) That regulation 1277 of the Post Office Department having been promulgated in 1893 and before the mail route 78108 was in existence is of no importance and would not control the contract herein, drawn in 1906.

(*e*) That the measure of damages includes the loss of profits and the loss of property.

We shall answer these contentions upon the general proposition that no breach of contract on the part of the United States is alleged in the petition. In our argument we shall particularize under three main heads as follows:

First. The terms of the contract gave the Postmaster General authority to terminate it.

Second. The regulations of the Post Office Department applying to this route gave the Postmaster General authority to discontinue the contract.

Third. The petition does not allege facts upon which damages may be based.

FIRST.

The terms of the contract gave the Postmaster General authority to terminate it.

(*a*) By the terms of the contract (Rec., p. 4) the Postmaster General could—

> discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, by allowing not to exceed a pro rata increase of compensation for any additional service thereby required; and, in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with. * * *

In substance, the contention of appellant is that the foregoing clause does not govern in this contract, for the reason that the expenses incident to the

carrying of the mails over the route in question were so great that "one month's extra pay" would not be a full indemnity in the event that the contract was discontinued. Appellant urges that this is true, because up to the time of the discontinuance he had spent a great deal more money in the purchase of equipment and the construction of roads than he would have needed to expend from the time of discontinuance to the end of the contract period. Is this any reason for eliminating the binding force of the above quoted clause? Appellant was under no mental disability when making the contract. He does not allege any ambiguity in the wording of this clause, and could not, for the reason that the same is obviously most clear and explicit. In fact appellant's counsel says in his petition (Rec., p. 12):

> Such difficulties and hardships as these were encountered constantly each year. *The foregoing facts and the physical and climatic conditions were matters of common knowledge in that part of Alaska and were known to the agents of the Post Office Department.*

If they were a matter of common knowledge, is not this common knowledge imputable to him? How then can appellant escape the terms of the contract in question, and what does it avail him to encumber his petition with recitals about the hardships incident to carrying the mails over the route in question?

In the case of *Lord* v. *Pomona Land & Water Co.* (153 U. S., 576 and 577) the court said:

> If the language is clear and unambiguous, it must be taken according to its plain meaning as expressive of the intention of the parties, and, under settled principles of judicial decision, should not be controlled by the supposed inconvenience or hardship that may follow such construction.

(*b*) Counsel for appellant charges in his brief, page 24, that the Postmaster General was guilty of "arbitrary or capricious or unreasonable exercise of power" without proper regard to the damage done the contractor. With a full consciousness of the liberality extended to those pleading their causes in the Court of Claims, we suggest, however, to this honorable court that there is grave doubt in our minds whether there is any allegation in the petition under the contract upon which the claim is based charging the Postmaster General with being arbitrary, capricious, or unreasonable.

It is true that in his petition (page 8 of the record) he says:

> * * * the contract was performed to the satisfaction of the Government until the service was arbitrarily, capriciously, and erroneously discontinued by the Postmaster General.

It seems to us that the charge contained in this quotation can only be applied to the contract between Crittenden and the Government, and not to the contract between appellant and the Government. A

perusal of the petition shows that there were incorporated in it two contracts. The first one was that between Crittenden and the Government. Crittenden was unable to carry out the contract, so he entered into an agreement with appellant to take the contract off his hands. The Postmaster General consented that appellant should take the place of Crittenden. Did there not then arise a contract between the Government and Miller, and does not the claim grow out of the Miller contract?

If our view of the petition is correct, any arbitrary, capricious, or erroneous conduct on the part of the Postmaster General with respect to the contract that Crittenden had is irrelevant.

However, let us suppose that this charge of arbitrary, capricious, or unreasonable conduct is made respecting the contract in question in this suit, i. e., that between Miller and the United States. Are not the teeth drawn from this charge by reason of the fact that there is *no bad faith imputed* to the Postmaster General in discontinuing the contract?

On page 24 of appellant's brief, he says:

> Bad faith is not charged here against the Postmaster General.

Now, in order to come within the decisions of this court, the action of the Postmaster General must carry with it the implication of bad faith and bad faith must be explicitly pleaded. In other words, actual or constructive bad faith must be alleged. We have seen, however, that the Postmaster General had

clear and unquestionable authority to declare the contract ended. He might have "arbitrarily" discontinued the service without implying bad faith on his part. The Revised Statutes, section 1277, gives him such power. It was not necessary to the proper exercise of this power that he should hear any protest or argument by the contractor, or that he should apprise him of the operations of his mind in reaching the conclusion that the public interest required the discontinuance of the service. He might have acted "capriciously," under any of the ordinary meanings of that word, without bad faith necessarily being implied thereby. He might even have acted "erroneously" without being guilty of bad faith. If error was committed, or, if the Postmaster General's determination was marked by caprice, it must have been so gross and palpable as to leave no other inference than that he was intentionally, consciously, and willfully unjust, unfair, and biased in his action. If he was empowered to annul the contract, is not the fact that he acted in a manner implying bad faith the only thing that can vitiate his act? The authorities hold that bad faith must be alleged. (Hudson on building contracts, pp. 580, 596–598; *Kihlberg* v. *U. S.*, 97 U. S., 398; *R. R. Co.* v. *March*, 114 U. S., 549–553; *R. R. Co.* v. *Price*, 138 U. S., 185–195; *Gleason et al.* v. *U. S.*, 175 U. S., 588.)

Since it is not alleged or claimed that there was actual or constructive bad faith on the part of the Postmaster General, it would appear to us by the

authorities from which we hereinafter quote that the point raised, i. e., the charge of capricious or unreasonable conduct on the part of the Postmaster General would not vitiate the act of the Postmaster General.

In the case of *The United States* v. *Gleason* (175 U. S., 588–607) Mr. Justice Harlan, in rendering the opinion, says:

> The fallacy, as we think, in the position of the court below was in assuming that it was competent to go back of the judgment of the engineer, and to revise his action by the views of the court. This, we have seen, could only be done *upon allegation* and proof of bad faith, or of mistake or negligence so great, so gross, as to justify an inference of bad faith. But in this case we find neither allegation nor proof.

It will be noted on examination of this case that the plaintiffs actually charged that the act of the engineer in refusing to extend the time of the contract was "wrongful and unjust." The opinion, however, holds that such language is not sufficient.

In the case of *McLaughlin* v. *The United States* (37 C. Cls., 150–190) the court says:

> The complaints of mismanagement relate to changes in the plans and the methods adopted for the inspection of work and material. These complaints involve charges against the architect or his assistant, and really constitute the gravamen of this entire proceeding.

> Under the rules stated ante, fraud or failure to exercise an honest judgment must appear in the conduct of the officer involved. The burden of proof is upon plaintiffs to establish such fraud or dishonesty.
>
> The contract is free from ambiguity as to the right of the Government to make changes and to direct inspection of work and material. It is surprising that charges so grave as those directed against the architects should not appear by specific allegation of fraud or mistake in the pleading. The petition contains a general charge of "mismanagement and delays on the part of defendants," but does not specify a single act of mismanagement except in the most general terms.

(*c*) The language of the contract making one month's extra pay "full indemnity" for all losses sustained by the contractor on account of the contract being terminated, is too clear for argument.

Probably the leading case governing the case at bar, and the one upon which we rely most strongly, is that of *Slavens* v. *United States* (196 U. S., 229; 38 C. Cls., 574).

The facts of this case were—

Slavens entered into a contract with the department for transporting the mails in Boston, Brooklyn, and Omaha. During the terms of the Boston and Brooklyn contracts the Postmaster General determined to carry certain of the mails on the electric street railway lines. The Postmaster General terminated the Boston and Brooklyn contracts, and

afterwards relet the same, at a lesser rate, to another contractor for the remaining portion of the period. The contracts in the Slavens case contained the same provision as to discontinuing the service as is contained in the contract in the case now under consideration.

In this case Mr. Justice Day, speaking for the court, said:

> It is contended by the appellant that this contract, properly construed, while it permits the Postmaster General to make changes in the schedule and termini of the route, to reduce the same, to increase, decrease, or extend the service, without change of pay, does not confer the right to cancel the contract except upon abandoning the entire service, which may be done with the allowance of one month's extra pay to the contractor. But it is insisted, so long as any part of the service remains to be performed, it is not within the power of the Postmaster General to put an end to the service of the contractor and relet a part of it to another, substituting a different character of service for a part of the field theretofore covered by the contract. In other words, it is contended that the total discontinuance of the service, which can only terminate the contract, must not leave any service to be performed in the district covered.
>
> We can not accede to this narrow construction of the powers given the Postmaster General by the terms of this contract. He is given general power to increase, decrease, or extend the service contracted for, without change of

pay. Furthermore, whenever the public interests in his judgment require it he may discontinue the entire service. We think the advertisement and the regulations under which this contract was made and the contract as entered into were intended to permit the Postmaster General, when in his judgment the public interest requires it, to terminate the contract, and if a service of a different character has become necessary in his opinion to put an end to the former service upon the stipulated indemnity of one month's extra pay being given to the contractor.

* * * * *

The authority given to the Postmaster General is broad and comprehensive, requiring him to exercise his judgment to end the service, and thereby terminate the contract, whenever the public interest shall demand such a change. In that event the contractor takes the risk that the exercise of this authority might leave him only the indemnity stipulated for—one month's extra pay (pp. 233 and 234).

Is not the foregoing opinion conclusive in the case at bar? But appellant would have us believe that the distinction between the *Slavens case* and the one at bar is that in the former the contractor was offered the privilege of continuing the contract at the reduced service, and refused to do so. Thus, the Postmaster General was relieved of the onus of capricious exercise of power, whereas in the case at bar the appellant did not have an opportunity or was not offered the privilege of continuing the contract at a

reduced price, and so the Postmaster General could be charged with a capricious exercise of power. But the weakness in this argument, as we have already pointed out, is that the simple charge of arbitrary or capricious exercise of power in discontinuing the contract does not differentiate this case, because bad faith is not charged in any place in the petition. Furthermore, his contention is immaterial, for the rights of the parties in this contract must be determined by its terms *only*, and the contract in the case at bar is silent about offering appellant the privilege of continuing the contract at a lesser rate.

It may not be inappropriate to call the attention of the court here to the fact that in the *Slavens case supra* appellant contended that the provisions of section 817 of the postal laws providing for discontinuance applied particularly to star route and steamboat service, such as the one there under consideration, but the court held on page 236 that—

> * * * the provisions of law are broad and comprehensive, and not limited by the terms of the act to such specific service * * *.

Again, the court has also held in the case of *Garfielde* v. *The United States* (93 U. S., 242) that not only does the Postmaster General have the power, under a contract similar to the one in the case at bar, to terminate the contract in his discretion and to remit one month's pay additional as indemnity, but that the United States is bounden to a claimant to pay the one month's pay after a contract has once been entered into.

Mr. Justice Hunt, delivering the opinion of the court, said:

> * * * The claimant states, in his proposal, that he has full knowledge of the laws and regulations of the department on the subject of mail transportation. He no doubt knew that this regulation provided that the Postmaster General could discontinue entirely the service for which he proposed, whenever in his judgment, the public interests required it, and that for such discontinuance one month's pay was to be deemed a full indemnity to the contractor. There was reserved to the Postmaster General the power to annul the contract when his judgment advised that it should be done, and the compensation to the contractor was specified. An indemnity agreed upon as the amount to be paid for canceling a contract must, we think, afford the measure of damages for illegally refusing to award it.

Appellant relies very largely upon the case of *United States* v. *Utah, Nevada and California Stage Company* (199 U. S., 414). There is, however, a marked difference between that case and the case at bar. The distinction grows out of the fact that in the *Utah, Nevada, and California Stage Company* case the Postmaster General called for an extension of service, whereas there is no allegation in the case at bar that appellant was called upon or performed additional service other than such service as it was commonly known would be required under conditions existing in Alaska. In the *Stage Company case* the action grew

out of a contract for mail service covering a period of four years in New York City. After the execution of the contract, Congress established a new distributing station and orders were issued from the post office from time to time creating new mail stations. As a result appellant was compelled to increase the number of wagons over and above the normal increase. The distance to be traveled by the wagons was extended over more than 300,000 miles during the period from October, 1893, to February, 1895. Thus, the conditions originally contracted for were changed by the action of Congress and the department. In the *Stage Company case* the court held in substance that the new or additional mail or transfer service which the contractor was required to perform under authority of the Postmaster General without additional compensation did not include the vast amount of additional work resulting from the opening of the new post office and not within the common knowledge of or contemplated by either of the parties when the contract was made. The court further held that the contractor had the right to presume that the Government knew how many stations would be served, and where the proposals positively specified that only two elevated-railroad stations were to be served, the contractor was entitled to extra compensation for serving four stations, notwithstanding the proposals required bidders to inform themselves as to the facts, and stated that additional compensation would not be allowed for mistakes.

We submit that this rather extended recital of the facts in this case upon which appellant relies shows a distinct line of cleavage between it and the case at bar.

In the case of *Wreford* v. *United States* (32 C. Cls., 415) the court, in its opinion, discusses in a very illuminating way the question of the measure of damages being one month's extra pay, where the Postmaster General terminates a contract under powers given him thereby.

We summarize our first point, then, as follows:

(1) There being no ambiguity in the wording of the contract, and—

(2) Appellant according to his own admission being charged with knowledge of the physical conditions of the country for whose mail service he was contracting, and—

(3) There being no bad faith charged to the Postmaster General on account of his discontinuing the contract, and—

(4) The Postmaster General having authority, under the terms of the contract and the decisions of the Supreme Court interpreting a similar contract, to discontinue the same,

The Postmaster General did not commit a breach of the contract when the same was discontinued by him.

SECOND.

The regulations of the Post Office Department applying to this route gave the Postmaster General authority to discontinue the contract.

We shall discuss appellant's contention that regulation 817 did not apply to Route No. 78108. This regulation, found on page 6 of the record, is as follows:

> The Postmaster General may discontinue or curtail the service *on any route, in whole or in part*, in order to place on the route superior service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause, he allowing as full indemnity to the contractor *one month's extra pay* on the amount of service dispensed with and a pro rata compensation for the amount of service retained and continued.

On page 7 of the record appellant declares that—

> The regulation * * * was not drawn and promulgated with reference to the conditions existing in Alaska on route No. 78108 during the period covered by the contract sued on, but it was drawn and promulgated with reference to conditions existing within the limits of the United States and exclusive of that route in Alaska, and particularly without reference to the hereafter-described conditions existing in that part of Alaska covered by the contract sued on.

We might object to this statement being in the petition, because—

(1) It is a most extraordinary bit of argument;

(2) It is a conclusion of the pleader and wholly contradictory to the terms of the contract, which is also a part of the petition.

(3) It is in contradiction to the laws and regulations of the department which govern all contracts and which are made a part of the petition.

However, we are informed by appellant that this regulation does not control, for it was promulgated 13 years previous to the letting of the contract for the carrying of the mails over this route and many years previous to the opening up of this road, and therefore the makers of this regulation could not have had in contemplation conditions such as were found on this route. Appellant was presumed to know the laws and regulations of the department, and this regulation was one of the laws of the department at the time the contract was entered into.

Furthermore, the laws and regulations which govern the carrying of the mails are general in their nature according to the opinion in the case of *Slavens*, *supra*, and apply to all sections of the United States and to all conditions, whether they be favorable or unfavorable.

Again, section 1261 of the postal laws and regulations in force at the time the contract was executed would, by its terms, foreclose the contention of appellant that the regulation in question heretofore quoted

did not apply to this case because of the unusual hardships. The section is as follows:

> Bidders for mail service must inform themselves of and consider the weight of the mail, the likelihood of its increase, the fact that foreign as well as domestic mails, and also post-office supplies, must be carried; *the condition of roads, hills, streams, etc., also whether there be toll bridges, ferries, or obstructions of any kind increasing the cost of service.* No claim for extra pay can be allowed for alleged mistakes or misapprehension as to the degree of service, nor for increased distance by reason of destruction of bridges, discontinuance of ferries, or other obstructions occurring during the contract term * * *.

If, therefore, the conditions of the country were matters of common knowledge, R., p. 12, and by section 1261 of the Postal Laws and Regulations a contractor was ordered to *inform* himself of the conditions surrounding the performance of the terms of the contemplated contract, and if the contention of appellant that the regulation in question does not apply in this case is wholly inconsistent with the terms of the contract which is clear and explicit, we submit that the Postmaster General, in discontinuing service over this route, was acting within the regulations of the Post Office Department as well as within the terms of the contract.

We submit that the cases which we have already quoted from or cited under our "First" point apply also with respect to the questions considered under our "Second" heading. We shall therefore not repeat them.

THIRD.

Does the petition allege facts upon which damages may be assessed?

Admitting for the sake of the argument only that the petition states a cause of action, has not the pleader failed to lay a foundation upon which damages may be estimated?

On page 25 of the petition, appellant, emerging from a maze of argument and conclusions, sets forth the following statement:

Disbursements on account of labor, feed, expenses on the route, including expenses of maintaining stations, etc	$110,040.03
Disbursements on account of Scott & Frase, subcontractors	41,129.52
Total disbursements	151,169.55
Total receipts from the Post Office Department	102,572.41
Total losses	48,597.14

The point we suggest here is, that there being no allegation in the petition that the expenditures made were reasonable expenditures and there being no allowance for materials or property on hand, it would be impossible to distinguish the proper expenditures or the speculative profits. For example, we call the court's attention to the following, appearing at bottom of page 23 of the petition (R., p. 14):

> About $1,000 worth of trail and bridge work between Tanana Crossing and Eagle had been done to shorten the winter route and give good service. It was necessary to do all these

> things that the contract might be performed, as the Government did not make allowance for delays whether caused by snows, storms, blizzards, the freeze-up in the fall, the break-up in the spring, or any other consideration, but fines were charged at every opportunity.

There is no allegation that this expenditure was *necessary* in the actual performance of the contract, nor is there any allegation that the amount expended was a reasonable one. The expenditures in the last quoted clause were made in order to escape paying fines. The amount expended might have been out of all proportion to the work done or the consideration received by appellant in return therefor. The money may have been expended with gross carelessness, and the only argument which counsel makes with respect to such expenditures was that they were made in order to avoid penalties.

On page 23 of the petition appellant alleges that he purchased $5,000 worth of horse feed. He does not allege that the price paid was a reasonable one, nor does he give credit for the value of that which he had on hand when the contract was terminated.

So then, we submit that before the amount of the contemplated profits can be found, it must be known what the reasonable expenditures were, and if the petition does not allege that the expenditures made were reasonable, how can it be known that they were reasonable and necessary, and if they were not reasonable and necessary, then how can we have any basis upon which to figure the difference between

the expenditures and the amount to be paid on the entire contract, which would be the profits?

Again, it is *argued* in the petition that the heavy expenditures came in the early part of the contract and prior to the time of the discontinuance of the contract by the Postmaster General, but that expenditures subsequent to the discontinuance would be very small, because things for which it was necessary to make expenditure had already been bought or built. Considering appellant's future in the light of his past it was certainly within the range of possibility that unexpected things could happen in the way of storms, spring floods, washed out trails, and loss of animals, which would cut down prospective profits. The point we make here is that an argumentative conclusion is not a sound basis on which to determine damages, as it is altogether too speculative.

We invite the court's attention to the case of *United States* v. *Behan* (110 U. S., 338, 340, 342–346).

In this case the contractor entered into a contract with the United States Army to make certain improvements in the harbor of New Orleans. The claimant was on the contractor's bond. The contract was annulled by the Government engineer before the work was completed, and after the contractor had expended large sums of money in providing machinery, materials, and labor for filling the contract. Action was brought by the bondsman.

We submit that this case is similar in fact to the case at bar, and explanatory of the manner of alleging damages and prospective profits.

CONCLUSION.

We respectfully submit, therefore, by way of conclusion, that the contract and the laws and regulations of the Post Office Department gave the Postmaster General the authority to terminate the contract in question; that in terminating it he acted within his rights and was not guilty of bad faith, nor of capricious exercise of power equivalent to bad faith; and finally, that although facts in the petition might otherwise state a cause of action, there are no facts alleged upon which damages could be estimated.

HUSTON THOMPSON,
Assistant Attorney General.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1913.

MILLER *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 178. Argued January 19, 20, 1914.—Decided April 6, 1914.

The postal contract involved in this action conferred authority on the United States to discontinue its performance and gave the Post Office authorities power after the discontinuance to deal with the mail routes which the contract previously embraced in such manner as was found necessary to subserve the public interest.

The averments of the bill did not show such a state of facts as would justify the conclusion that the action of the Post Office authorities in exerting the lawful power of discontinuance was so impelled by bad faith as to cause the exertion of the otherwise lawful power to be invalid and void.

In determining rights thereunder, this court must be governed by the contract, and cannot first destroy it in part and then enforce that which remains.

The difficulties in performing a postal contract are presumably in the minds of the contracting parties, and the Government cannot be deprived of the protection of the reserved powers of cancellation in case of the failure of the contractor to perform by reason of such difficulties.

Where the hardships endured by a postal route contractor are the results of his own mistake in making an improvident contract, relief can only be obtained at the hands of Congress.
47 Ct. Cl. 146, affirmed.

THE facts, which involve the authority of the Postmaster General to cancel postal contracts and the rights of a contractor for a mail route in Alaska in that respect, are stated in the opinion.

Mr. Louis T. Michener, with whom *Mr. Perry G. Michener* was on the brief, for appellant:

In the construction of the contract, or any particular clause or part of it, the court is to examine the entire contract, consider the relations of the parties, their connection with the subject-matter, the circumstances under which it was signed, the state of things existing at the time it was made, the nature of the obligations between the parties, and is to look carefully to the substance of the agreement as contra-distinguished from its mere form, in order to give it a fair and just construction, and ascertain the substantial intent of the parties. *Canal Co.* v. *Hill*, 15 Wall. 94, 99–101; *Rock Island Ry.* v. *Rio Grande R. R. Co.*, 143 U. S. 596, 609; *Winona Land Co.* v. *Minnesota*, 159 U. S. 526, 531; *United States* v. *Utah &c. Stage Co.*, 199 U. S. 414, 423.

The discontinuance stipulation should be so construed as not to apply to a case in which the payment of one month's extra pay would be grossly inadequate as indemnity or compensation to the contractor. *United States* v. *Utah &c. Stage Co.*, 199 U. S. 414; *Serralles' Succession* v. *Esbri*, 200 U. S. 103, 113; *Schuylkill Nav. Co.* v. *Moore*, 2 Whart. 491.

A stipulation could be so written as to be a complete and lawful ascertainment and liquidation of damages. *Sun Printing & Pub. Assn.* v. *Moore*, 183 U. S. 642.

This contract is not to be so construed as to give the

officer the power to do arbitrary, capricious, oppressive, or unreasonable things, to the cost or damage of the contractor, for it is implied that the officer will do nothing of the kind. *United States* v. *N. A. Com. Co.*, 74 Fed. Rep. 145, 149; *Lewman's Case*, 41 Ct. Cls. 470, 478; *Ripley* v. *United States*, 223 U. S. 695, 701; *Griffith's Case*, 22 Ct. Cls. 165, 193; *C., M. & St. P. Ry. Co.* v. *Hoyt*, 149 U. S. 1, 15. And see *Slavens* v. *United States*, 196 U. S. 229, distinguished.

The contractor was entitled to fair play, and the officer could have given it to him, for there was neither law nor contract to forbid. *Garfielde* v. *United States*, 93 U. S. 242, distinguished as turning on the power of the Postmaster General to discontinue the service under the regulations, and this court holding that he had that power.

The long existing regulations are of importance here because their substance was incorporated in the contract.

"Annul" and "discontinue" are not equivalent or synonymous terms.

The damages here include loss of profits and loss of property. A contractor may recover the amount of profits lost. *Hinckley* v. *Pittsburgh Steel Co.*, 121 U. S. 264, 275; *Anvil Min. Co.* v. *Humble*, 153 U. S. 540, 549; *Boehm* v. *Horst*, 178 U. S. 1, 15.

An injured contractor is entitled to be made whole. In the application of this rule, damages are allowed for his personal property lost. *Figh's Case*, 8 Ct. Cls. 319, 324, 325; *Roetinger's Case*, 26 Ct. Cls. 391, 398, 408.

On the state of facts in this case appellant had the legal right, indeed it was his legal duty, to perform the contract, and upon such performance he became entitled to recover in his own name for the losses and damages incurred. *United States* v. *Hitchcock*, 164 U. S. 227; *United States* v. *Behan*, 110 U. S. 338; *Salisbury* v. *United States*, 28 Ct. Cls. 52.

It was not necessary to charge the Postmaster General

with bad faith in order to state a cause of action. If the Postmaster General acted beyond his rights and powers under the contract and the law, and damages resulted therefrom to the appellant, the right of action exists, and this is true no matter what the motives of the official may have been. *Robertson* v. *Frank Bros. Co.*, 132 U. S. 17, 24; *Lewis* v. *Chicago &c. R. R.*, 49 Fed. Rep. 708; *Lyons* v. *United States*, 30 Ct. Cls. 352, 365.

The averments in the petition concerning expenditures, values, and damages are sufficient. They are in harmony with 2 Chitty on Plead., 16th Am. ed., 37, 38. See *District of Columbia* v. *Barnes*, 197 U. S. 146, 154, citing *United States* v. *Burns*, 12 Wall. 246, 254; *United States* v. *Behan*, 110 U. S. 338, 347.

In proving damages it will be necessary for claimant to comply strictly with the rules of evidence, and it will be incumbent on the court below to make clear and specific findings on the subject. Should it be found desirable the Government may file a motion to make the petition more specific. The demurrer cannot be made to take the place of such a motion.

Mr. Assistant Attorney General Thompson for the United States:

The terms of the contract gave the Postmaster General authority to terminate it.

The regulations of the Post Office Department applying to this route gave the Postmaster General authority to discontinue the contract.

The petition does not allege facts upon which damages may be assessed.

In support of these contentions, see *Garfielde* v. *United States*, 93 U. S. 242; *Gleason* v. *United States*, 175 U. S. 588; *Kihlberg* v. *United States*, 97 U. S. 398; *Lord* v. *Pomona Land Co.*, 153 U. S. 576; *McLaughlin* v. *United States*, 37 Ct. Cls. 150; *Railroad Co.* v. *March*, 114 U. S. 549;

Railroad Co. v. *Price*, 138 U. S. 185; *Slavens* v. *United States*, 196 U. S. 229; *United States* v. *Behan*, 110 U. S. 338; *United States* v. *Utah &c. Stage Co.*, 199 U. S. 414; *Wreford* v. *United States*, 32 Ct. Cls. 415; Postal Laws and Regulations, §§ 817, 1261; Rev. Stat., § 1277.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The petition claimed $51,736.00 because of an alleged violation of a contract to carry the mails over a mentioned route in Alaska. The United States demurred on the ground that no cause of action was stated, and the court having sustained the demurrer and dismissed the petition, 47 Ct. Cl. 146, the case is here. The text of the petition therefore is the matter we are called upon to consider. It covers sixteen pages of the printed record. We shall seek to rearrange its contents so as to enable us with accuracy and yet with brevity to state the substance of the petition in order to determine whether a cause of action was stated.

It was alleged that on September 15, 1905, the United States advertised for proposals to carry the mails over a route in Alaska from Valdez to Eagle, a distance of 428 miles, and back. The advertisement conveyed information concerning the route and the duty which would rest upon the contractor, and contained the following:

"The Postmaster General may order an increase of service on a route by allowing therefor not to exceed a pro rata increase on the contract pay. He may change schedules of departures and arrivals in all cases, and particularly to make them conform to connections with railroads, without increase of pay, provided the running time be not abridged. The Postmaster General may also discontinue, change, or curtail the service in order to place on the route superior service, or whenever the public

interest, in his judgment, shall require such discontinuance, change, or curtailment for any other cause, he allowing as full indemnity to contractor one month's extra pay on the amount of service dispensed with, and not to exceed pro rata compensation for the amount of service retained and continued; but the Postmaster General reserves the right to rescind any acceptance of a proposal at any time before the signing on behalf of the United States of the formal contract, without the allowance of any indemnity to the accepted bidder."

Under this proposal the bid of John B. Crittenden to do the called for work at $46,000.00 per annum was accepted, and on the first of February, 1906, a contract was entered into between the Government and Crittenden and his sureties, John Miller and Charles H. Cramer, for performing the service for the sum of the bid for the period of four years from the first of July, 1906 to June 30, 1910. The written contract contained specifications as to the character of the work, its requirements and the mode of its performance which it is not here necessary to detail. Besides a full stipulation giving the Postmaster General authority to enforce the contract and all its provisions by imposing penalties and forfeitures and by discontinuing the contract in case of non-performance, as embodied by the provisions which are reproduced in the margin,[1] the contract contained the following:

[1] And it is hereby further stipulated and agreed by the said contractor and his sureties that the Postmaster General may annul the contract or impose forfeitures in his discretion for repeated failures or for failure to perform service according to contract; for violating the postal laws or regulations; for disobeying the instructions of the Post Office Department; for refusing to discharge a carrier, or any other person having charge of the mail by the contractor's direction, when required by the Department; for subletting service without the consent of the Postmaster General, or assigning or transferring this contract; for combining to prevent others from bidding for the performance of postal service; for transmitting commercial intelligence or matter

"It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, by allowing not to exceed a pro rata increase of compensation for any additional service thereby required; and, in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with, and not to exceed a pro rata compensation for the service retained; but no increase of compensation shall be allowed for a change of service not amounting to an increase, nor indemnity of month's extra pay for any change of service not involving a decrease of service."

In addition the statutory provisions governing the subject and the Post Office regulations having the force of law which had been stated in the advertisement for proposals were by reference incorporated and made a part of the contract by the following provision:

"That this contract is further to be subject to all the conditions imposed by law, and by the several acts of Congress relating to post offices and post roads, and to the conditions stated in the pamphlet advertisement of September 15, 1905."

It was averred that shortly after the making of the contract Miller, the petitioner, who was one of the sureties of

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which should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; or for the failure of the contractor to give his personal supervision to the performance of the service; and to reside upon or contiguous to the route; that the Postmaster General may annul the contract, whenever the contractor shall become a postmaster, assistant Postmaster, or member of Congress, or otherwise legally incompetent to be concerned in such contract: and whenever, in the opinion of the Postmaster General, the service can not be safely continued, the revenues collected, or the laws maintained on the road or roads herein.

Crittenden, found that he was not able to supply the capital needed for the performance of the contract and therefore he, Miller, as surety, was obliged to and did expend the moneys needed to buy "harness, sleds, horse feed, horses and dogs to carry the mails" under the contract, so that by the first of July, 1906, the contractor was ready to perform and did commence the performance of his duties under the contract and continued to perform them until the time when subsequently the contract was discontinued by the Postmaster General. It was averred that after thus advancing the money as surety of Crittenden, Miller, finding that further advances were necessary to enable Crittenden to go on with his work, formed a partnership with him and under this partnership advanced large sums of money to meet the heavy expenses which were required, and continued to do so, during a period of nearly two years, that is up to or on or about the first of May, 1908, when he was compelled, in order to protect himself, and the United States, to take a transfer of the contract from Crittenden, that is, to become the sub-lessee of the contract, his written agreement dated the first of May, 1908, with Crittenden to that effect having been approved by the Post Office authorities, indeed it was alleged that such agreement was written by those authorities. This sub-letting contract which was set out in full in the petition bound Miller, the subcontractor, by all the obligations of the original contract, made him liable for all fines, forfeitures, etc., imposed under the original contract, and expressly subjected him to the risk of the power to change, increase, modify or discontinue the service as provided in the original contract, the clauses covering these two latter subjects being in the margin.[1]

[1] And it is hereby further agreed that liability for all fines and deductions imposed upon a party of the first part by the Postmaster General, for failures and delinquencies in the performance of service under his contract shall be assumed and borne by the party of the second part,

It was alleged that the petitioner as subcontractor performed the contract as long as he was permitted to do so by the United States; that on August 11, 1908, the Postmaster General issued an order discontinuing the contract service over the route which the contract embraced, to take effect on September 30, 1908, and this order was enforced at the time mentioned and an indemnity allowance of pay for one month only was made the contractor. The petition alleged that for many years "the regulations adopted and enforced by the Post Office Department have authorized the Postmaster General to discontinue or curtail the service, in whole or in part, in order to secure 'a better degree of service' or 'superior service,' or whenever the public interest, in his judgment, should require such discontinuance or curtailment for any other cause; he allowing, as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and pro rata compensation for the amount of service retained and continued." The continuance of this regulation was alleged and the various changes in the mere form in which it was expressed up to and including the time when the regulation then existing found statement in the contract and in the proposals subject to which, as we have seen, the contract was made. The petition however averred as follows:

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and, if necessary, the Auditor for the Post Office Department may enforce this agreement by proper deductions from any compensation due the party of the second part for service performed under this subcontract.

And it is hereby further agreed that for any additional service required by the Postmaster General, and not hereinbefore expressly stipulated, the party of the second part shall be allowed not to exceed a pro rata increase of compensation; and, in case of decrease, curtailment, or discontinuance of service, as full indemnity, a pro rata of the one month's extra pay allowed by the United States to the party of the first part, and, unless previously herein stipulated, not to exceed a pro rata compensation for the service retained.

"The regulation, whatever its language or its number, was not drawn and promulgated with reference to the conditions existing in Alaska on Route No. 78108 during the period covered by the contract sued on, but it was drawn and promulgated with reference to conditions existing within the limits of the United States and exclusive of that route in Alaska, and particularly without reference to the hereafter described conditions existing in that part of Alaska covered by the contract sued on.

"In the preparation of the forms of advertisement, proposal and contract in suit, the government officials adopted the regulation in force, and such advertisement, proposal and contract were drawn and printed for general use, and the proposal and contract were presented for execution, without particular regard to the physical, climatic, or other conditions then existing or that might exist along the line of that route during the contract period of four years. At the execution of the proposal and contract, and of the subsequent contract of subletting, Crittenden and petitioner did not think or believe that the contract in suit would be discontinued or terminated in any manner or form, but on the contrary, they believed that the contract in suit would be in full force and effect during the whole contract period, and they named the amount of annual compensation in that belief. They expected that they would encounter losses of profits in a portion of the contract period, but would earn good profits before the contract period ended and for the whole contract period. Had Crittenden and the petitioner believed otherwise than as above stated, they would not have executed either of the contracts for that annual compensation, nor would petitioner have made the arrangements and expenditures in the early part of *1903*, [1908] hereinafter described. On the contrary, petitioner made such arrangements and expenditures in the belief that the contract would be in force for the full contract period. Peti-

tioner avers that if the government had asked bids for a two year contract on that route Crittenden would not have submitted a bid at all, and petitioner would not have become surety on any contract for less than $92,000 per annum, because the conditions were such that the expenses of carrying the mails on the route would be far heavier for carrying them in 1906 than in 1907, and in 1907 than in 1908, and in 1908 than in 1909. As an illustration, the petitioner avers that it cost, to-wit: $151,169.55 to perform the contract until it was discontinued by order of the Postmaster General, that amount being to-wit: $48,595.08 more than the total sum received from the government, but it would only have cost him, to wit: $43,390 to perform the contract for the remaining twenty-two months of the contract period, during which time he would have received, to-wit: $84,326.00 for carrying the mails, a profit of, to wit: $40,936."

The petition moreover alleged that the conditions which existed at the time the contract was made in the region covered by the mail route which it embraced, caused it to be extremely difficult and hazardous to human life and property to carry the mails over the route described and within the time specified in the contract. In many places it was averred, the government trails were not fit to be used because of their bad condition, and it became necessary to build new ones. With much amplitude, the petition described the almost insurmountable difficulties with which the performance of the contract was environed: the cutting of trails, the building or repairing of bridges, the erecting of sheds, the transporting at an enormous expense along the route of the means to sustain men and horses, the struggle in doing so in winter through ice and snow, and in spring and summer, the overcoming of obstacles resulting from flood and many other causes. Indeed, the facts detailed, being taken as true, establish that the performance of the contract was surrounded by difficulty of the

gravest character to overcome which called for the manifestation on the part of the contractor of courage, the exertion of great energy and a willingness to make sacrifices in order to discharge the duties imposed by the contract. It was alleged that the making of the strenuous exertion and the incurring of the hazards to life and property which, as we have stated, the petition described, were necessary "as the Government did not make allowance for delays, whether caused by snows, storms, blizzards, the freeze-up in the Fall, the break-up in the Spring, or any other consideration, but fines were charged at every opportunity."

It was alleged that counting on the fact that the contract would be allowed to go to its termination, after the petitioner became the sub-lessee he spent a large amount of money in putting the route in fair condition, in provisioning the same by shipping food for men and horses at freight rates which were enormous, all of which he would not have done had he been informed of the intention of the Government to discontinue the contract before the end of the contract period. That upon the same reliance, as a means of utilizing his equipment, he bought out the rights and assumed the obligations of a contract which had been made by a firm known as Scott & Frase for carrying the mails from a point known as Tanana Crossing to Eagle, the place where the contract of which the petitioner was the sub-contractor terminated.

It was alleged that although in September, 1908, the Government discontinued the contract of petitioner, it did not discontinue the mail service, to which that contract related, but only restricted it, that is cut out about 190 of the 428 miles between Valdez and Eagle and in the balance had the mails carried by contracts exacting a less onerous and less frequent service, these contracts having been made as emergency contracts, without advertisement, without affording the petitioner any opportunity to bid

for them or to take them under the prior contract which was discontinued by the order of 1908. The sum which was claimed was the alleged loss resulting from having been obliged to discontinue the contract, the calculation in effect on the subject charging the amount spent under the contract as well as $41,129.52 as the result of the purchase of the Scott & Frase contract, and crediting the total amount received from the Government.

These being the averments of the petition, it is obvious, the questions are as follows: First, did the contract confer the authority on the United States to discontinue its performance, and, if so, did it give power to the Post Office authorities after the contract was discontinued to deal with the mail routes which the contract had previously embraced in such a manner as was found necessary to subserve the public interest; second, if yes, did the averments of the bill show such a state of facts as would justify the conclusion that the action of the Post Office authorities in exerting the lawful power of discontinuance was so impelled by bad faith as to cause the exertion of the otherwise lawful power to be invalid and void?

That in explicit terms the express authority was given to the United States to discontinue the execution of the contract is so plainly the result of the proposal which led up to the contract, of the text of the contract itself, of the Post Office rules and regulations which by the text were incorporated in and made a part of the contract, as to leave no room for discussion. Indeed this result was in terms admitted by the allegations of the petition to which we have referred, and the challenge of the power to discontinue therein made, conceded that the terms of the contract gave the power, but relied only upon the assertion that such terms, although express and positive, should be read out of the contract as inapplicable to the situation to which the contract related, that is, the carriage of the mail over the designated route in Alaska.

But we must be governed by the contract and cannot, as we are asked to do, first destroy it in part and then enforce that which would remain, which would be the result of holding that the stipulations of the contract conferring power upon the Government may be obliterated and the contract with those stipulations wiped out be enforced as against the Government for the benefit of the petitioner. And the absolutely conclusive force of this view, when considered as a general proposition, is at once additionally demonstrated by a particular consideration of the case in hand, since the reserve power on the part of the Government to discontinue the contract which is here in question, found its place in the proposal and contract in consequence of the postal regulations having the effect of law which had prevailed for many years and which therefore, caused the contract with the reservation of the right to discontinue to be but the expression of a rule of public policy limiting in the public interest the power to contract, a limitation sanctioned over and over again at least by an unerring implication by statutory approval. Of course under this condition of things, the suggestion that the contractor would not have bound himself to the Government if he had considered that the unambiguous words of the contract would be enforced can be of no avail. And it is equally manifest that it is impossible to give any effect to the suggestion that the terms of the contract did not apply because of the place where the work covered by the contract was to be performed. The presumption is that whatever may have been the difficulties of performance, they were in the minds of the contracting parties and were elements entering into the offer by the contractor to do the work for a stated compensation and also constituted elements of danger against which the Government protected itself by the express reservation of the right to discontinuance which was explicitly exerted. While it is not necessary to do so, we observe in passing that the aver-

ments of the petition itself give rise to inferences sustaining this very natural conclusion.

That the power to discontinue the contract left the Government free after such discontinuance to make such contracts as were deemed best, is also the unambiguous result of the proposals submitted by the Government, of the text of the contract itself, and of the context of the postal rules and regulations which by reference were incorporated into the contract. In fact, while the context establishes this result so clearly and so obviously as to leave no room for extraneous reasoning, if such were not the case, and purpose and intent required to be looked at, it is manifest that to deny that such power existed would be to set aside and frustrate the public policy upon which the right to discontinue rests. It would render the exertion of the power futile—or cause it to be inadequate to protect the public interest since it would deprive of means of remedying the evil to cure which the right to discontinue was exerted. The irresistible force of the contract itself on the subject has been previously pointed out by this court in a case which was cited by the court below in its clear opinion. *Slavens* v. *United States*, 196 U. S. 229, 233, 236.

Making the assumption for the sake of the argument only that the existence of a fraudulent motive or of bad faith impelling the exercise by the Postmaster General of the authority conferred upon him to discontinue, be a factor in determining whether an otherwise valid power had been lawfully exerted, such concession could have no possible reference to this case, since it is expressly conceded in the argument at bar that no such charge was made in the petition and none is relied upon, the only claim being that a power not conferred was exerted or that if one which was given was exercised, the circumstances disclosed were of such a character as to justify the legal conclusion that it was so grossly inequitable to bring

the power into play that its exertion ought not to receive judicial sanction. But this simply calls upon us to substitute judicial discretion for the discretion lodged by the law and the contract in the Postmaster General, a power which of course it is beyond our competency to exercise. Let it be conceded that if the truth be admitted of all the facts as to the unforeseen difficulties, the stress of storm and blizzard and snow and ice and freshet, which prevailed as averred over the trackless wilderness through which the mail route extended, a case of great hardship would be established, the very truth of the averments referred to also naturally suggests the reasons which in the exercise of a wise discretion may have called into play the exertion of the power to discontinue the contract in the public interest and for the public benefit. As under the conditions stated the hardships alleged were but the result of a mistake of the petitioner in making an improvident contract, relief can only be obtained at the hands of Congress.

Affirmed.